TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 995.

THE LACLEDE BANK AND J. T. CRAIG, ASSIGNEE OF J. N. ISRAEL, APPELLANTS,

vs.

HARRISON B. SCHULER.

FILED SEPTEMBER 16, 1886.

No. 1017.

HARRISON B. SCHULER, APPELLANT,

vs.

THE LACLEDE BANK AND J. T. CRAIG, ASSIGNEE OF J. N. ISRAEL.

FILED SEPTEMBER 27, 1886.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA,
Eastern District of Missouri:

In the Circuit Court of the United States in and for said District.

Be it remembered that on the thirtieth day of December, A. D. 1885, the following among other proceedings were had and appear of record in said court, to wit:

Bill of Complaint Filed.

HARRISON B. SCHULER, Complainant,
vs.
LACLEDE BANK *et al.*, Defendants. } 2584.

Now comes complainant, by Dyer, Lee & Ellis, his solicitors, and files his bill of complaint herein *nunc pro tunc* as of December 7th, 1885.

And thereupon the defendants, Laclede Bank and J. T. Craig, by Boyle, Adams & McKeighan, their solicitors, enter their appearance *nunc pro tunc* as of December 7th, 1885.

Said bill of complaint is in words and figures following, to wit:

Bill of Complaint.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

In the Circuit Court of the United States for said District.

HARRISON B. SCHULER, Complainant,
vs.
LACLEDE BANK and J. T. CRAIG, Defendants.

2 To the judges of the circuit court of the United States for the eastern district of Missouri:

Harrison B. Schuler, a citizen of the State of Kansas, brings this his bill against the Laclede Bank, a corporation duly organized under the laws of the State of Missouri and a citizen thereof, and J. L. Craig, a citizen of the State of Texas.

Your orator further states that on or about the 16th day of October, 1885, one G. A. Archibold, of the city of Henrietta, in the State of Texas, had in his hands for collection a certain note belonging to the complainant for the sum of twenty-five thousand dollars, which said note was made, executed, and delivered to complainant by E. C. Sugg, of the said State of Texas; that on or about the 18th day of October, 1885, the said E. C. Sugg drew his certain check payable to said Archibold or order for the sum of twelve thousand five hundred dollars on the State National Bank of Fort Worth, Texas, the amount thereof to be credited on said note of twenty-five thousand dollars when said check should be paid by said State National Bank.

That the said Archibald, on the said 18th day of October, 1885,

deposited said check with C. W. Israel & Co., bankers, at Henrietta, Texas, for collection; that the said C. W. Israel & Co. forwarded said check to the State National Bank of Fort Worth, Texas, and instructed said latter bank (in case said check was paid) to remit the proceeds or the greater part thereof to the Laclede Bank, one of the defendants herein, for the account and credit of the said C. W. Israel & Co.

Your orator further shows unto your honors that the said State National Bank of Fort Worth, Texas, paid said check of E. C.
3 Sugg, and in accordance with the instructions of the said C. W. Israel & Co. remitted the proceeds or the greater portion thereof to the said Laclede Bank for the credit of said C. W. Israel & Co., which remittance was by the said Laclede Bank received on or about the 20th day of October, 1885.

That the said C. W. Israel & Co. were on the 20th day of October, 1885, duly notified by the said State National Bank of the payment by it of said check of E. C. Sugg and of the remittance to the said Laclede Bank of the proceeds thereof; that thereupon, to wit, on the said 20th day of October, 1885, the said C. W. Israel & Co. drew their certain check No. 9950, in favor of complainant, for the sum of eleven thousand two hundred and fifty dollars on the said Laclede Bank in part payment of said collection, which check is in words and figures following, to wit:

"C. W. Israel & Co., bankers.

"No. 9950. HENRIETTA, TEX., *Oct. 20th*, 1885.

"Duplicate unpaid.

"Pay to the order of H. B. Schuler, Esq., eleven thousand two hundred and fifty dollars.

"G. A. ARCHIBALD, *Cashier.*

"To Laclede Bank, St. Louis, Mo."

Your orator further states that on said 20th day of October, 1885, said G. A. Archibald forwarded said last-named check by mail to the complainant at Winfield, Kansas; that thereafter com-
4 plainant forwarded said check through the Citizens' National Bank of Kansas City, Missouri, and through it to the St. Louis National Bank of St. Louis for collection; that the same was forwarded as expeditiously as the mails between the different points aforesaid would admit; that the said St. Louis National Bank presented said check for payment to the defendant, the said Laclede Bank, on Monday, the 26th day of October, 1885, and payment was refused upon the ground, as the said Laclede Bank alleged, that the firm of C. W. Israel & Co., the drawers thereof, had on the 24th day of October, 1885, made an assignment, under the laws of the State of Texas, for the benefit of their creditors, of which it, the said Laclede Bank, had been advised by telegraph; that thereupon said St. Louis National Bank, the then holder of said check for the purpose aforesaid, caused the same to be duly protested for non-pay-

ment and the drawers thereof duly notified of the presentment, demand, and refusal to pay as aforesaid of said check.

Your orator further states that the said Laclede Bank was the business correspondent of the said C. W. Israel & Co. at the time said check was presented to it for payment, and had been such for a long time prior thereto; that at the time said check was presented the said Laclede Bank as aforesaid for payment there was, in addition to the amount so as aforesaid remitted to it by the State National Bank of Fort Worth as aforesaid a large sum of money, as complainant is informed and believes, to wit, the sum of more than ten thousand dollars.

Your orator further states unto your honors that in equity and good conscience the funds (or so much thereof as may be necessary) to the credit of the said C. W. Israel & Co. in the said Laclede Bank as aforesaid ought to be appplied to the payment of said check, interest, damages, and costs.

Your orator further states that the defendant, the said J. T. Craig, claims (as your orator is informed and believes) to be the assignee, under the laws of the State of Texas, of the said C. W. Israel & Co., and that he makes claim, as assignee, to the fund so as aforesaid in the said Laclede Bank; wherefore he is made a party defendant herein.

Your orator prays that, upon a full hearing of the facts herein alleged to be true, your honors will order, adjudge, and decree that the defendant, the said Laclede Bank, pay over to him or his solicitors of record a sum sufficient to pay the amount of said check so as aforesaid drawn on it by the said C. W. Israel & Co., together with interest, damages, and costs, and for such other and further orders, judgments, and decrees as your orator may show himself entitled.

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the said Laclede Bank and the said J. L. Craig, thereby commanding them and every of them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator will ever pray.

DYER, LEE & ELLIS,
Solicitors for Complainant.

UNITED STATES OF AMERICA, *Eastern District of Missouri:*

In the Circuit Court for said District.

At the city of St. Louis and district aforesaid this the 21st day of November, 1885, personally appeared before me, the undersigned notary public, David P. Dyer, one of the solicitors for the above-named complainant, and made oath that the facts set forth in the foregoing bill, as far as they purport to be stated of his

(complainant's) own knowledge, are true, and so far as they purport to be stated on information and belief he believes to be true.

DAVID P. DYER.

Subscribed and sworn to before me this —, November 21st, 1885.

[SEAL.] F. E. G. CARR,
Notary Public.

We acknowledge service of a copy of the foregoing bill, and hereby enter the appearance of the defendant, the Laclede Bank, to the December (1885) rules of the circuit court of the United States for the eastern district of Missouri.

Nov. 21, 1885.

BOYLE, ADAMS & McKEIGHAN,
Solicitors for Laclede Bank.

Appearance of J. T. Craig, one of the above-named defendants, is also entered to the December (1885) rules of the circuit court of the United States for the eastern district of Missouri.

Dec. 7, 1885.

BOYLE, ADAMS & McKEIGHAN,
Solicitors for Def't, J. T. Craig.

Separate Amended Answer of the Laclede Bank.

And afterwards, to wit, on the 26th day of March, A. D. 1886, there was filed in said cause the separate amended answer of the Laclede Bank, to wit:

7 In the Circuit Court of the United States, Eastern District of Missouri.

HARRISON B. SCHULER, Complainant,
vs.
LACLEDE BANK and J. T. CRAIG, Defendants.

Separate amended answer of Laclede Bank to the bill of complaint of Harrison B. Schuler.

This defendant, now and at all times hereafter saving and reserving unto itself all benefit and advantage of exception which may be had or taken to the many errors, uncertainties, want of equity, failure to state ground for relief either at law or in equity, uncertainties, and other imperfections in said bill contained, for amended answer thereto, leave of court having been first obtained, or so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, says:

That it admits, as charged in said bill, that it is a citizen of the State of Missouri; that complainant is a citizen of the State of Kansas; that J. T. Craig is a citizen of the State of Texas and claims to be assignee under the laws of said State of Texas of C. W. Israel & Company and a certain voluntary conveyance hereinafter set forth under said laws by said C. W. Israel & Company, and that said as-

signee claims under said assignment the funds in the hands of this defendant on open and general account subject to the claims and rights of said bank in and to the same hereinafter to be set forth.

This defendant, further answering said bill of complaint, admits, on information and belief, that one G. A. Archibald, of
8 the City of Henrietta, in the State of Texas, on or about the 16th day of October, 1885, had in his hands for collection a certain note belonging to the plaintiff for the sum of $25,000 before that time executed and delivered to complainant by one E. C. Sugg, of said State of Texas.

This defendant, further answering, admits, on information and belief, that said Sugg drew his certain check for the sum of $12,500.00 on the State National Bank of Forth Worth, Texas, and delivered it to said Archibald, payable, however, to the order of C. W. Israel & Company instead of Archibald, the amount thereof to be credited on said note when paid by said bank at Forth Worth; but this defendant states on information and belief, and so charges the truth to be, that said check was drawn by said Sugg and dated on the 16th of October, 1885, instead of the 18th of October, 1885, as alleged in said bill.

This defendant, further answering, admits on information and belief that said Archibald deposited said check for collection with said C. W. Israel & Company, bankers, at Henrietta, Texas, and that said C. W. Israel & Company forwarded the same to said State National Bank at Fort Worth, Texas; but this defendant avers on information and belief that said check was forwarded on the 16th of October, 1885, instead of the 18th of October, 1885, as charged in said bill.

This defendant, further answering on information and belief, denies that in forwarding said check as aforesaid or at any time the said C. W. Israel & Company instructed the said bank at Fort Worth, in case said check should be paid, to remit the proceeds, or the greater part thereof, or any part thereof, to this defendant for the account and credit of the said C. W. Israel & Company. On the contrary, this defendant avers on information and belief, and
9 so charges the truth to be, that said C. W. Israel & Company, on, to wit, the said 16th day of October, 1885, received said check for collection from said Archibald, and it was by his direction credited by said C. W. Israel & Company to collection account on the books of said Israel & Company until it should be heard from; that afterwards, on said day, to wit, October 16th, 1885, the said Israel & Company sent said check by mail to said State National Bank at Fort Worth, Texas, for credit of themselves without further instructions, and the amount of said check was by said bank at Fort Worth, Texas, passed to the credit of said Israel & Company on its books on, to wit, the 17th of October, 1885, as this defendant is informed and believes and so charges the truth to be, the said C. W. Israel & Company, as this defendant is informed and believes, being, at the date of the reception of said check, overdrawn at said bank at Forth Worth about $340.00.

This defendant, further answering, avers on information and be-

lief, and so charges the truth to be, that on, to wit, October 19th, 1885, the said Israel & Company directed by letter the said bank at Fort Worth, the said latter bank being then and there the regular correspondent of said Israel & Company, as this defendant is informed and believes, to remit to this defendant the sum of $7,000, and to charge the same against the account of said Israel & Company, but said sum was not, as this defendant is informed and believes, and so charges the truth to be, ordered to be remitted out of the process of said Sugg check or any other specific fund, but only in the regular course of business between said banks. And in the same letter said C. W. Israel & Company directed said bank at Fort Worth to remit to the Exchange Bank of Wichita Falls, here-
10 inafter referred to, $5,000 in currency, which was done and the same charged against the general account of said C. W. Israel & Company. Said Exchange Bank of Wichita Falls was also directed by said C. W. Israel & Company at the same time, as this defendant is informed and believes, to remit to this defendant $3,500.00, which said Exchange Bank did by its check on this defendant in favor of said C. W. Israel & Company, which was received by this defendant on, to wit, October 21st, and the same charged against the account of said Exchange Bank and credited to the account of said C. W. Israel & Company.

This defendant, further answering said bill of complaint, on information and belief, admits that said bank at Fort Worth paid said Sugg check, but only, as this defendant avers on information and belief, in manner and form as hereinbefore stated. This defendant, on information and belief, denies that said bank at Fort Worth, in accordance with the instructions of said Israel & Company, remitted the proceeds of said check, or the grater part thereof or any part thereof, to this defendant for the credit of said Israel & Company, or that any such remittance was received on or about the 20th of October, 1885, or at any other time. On the contrary, this defendant, on information and belief, charges the truth to be that said bank at Fort Worth, in compliance with the directions given by said Israel & Company, as hereinbefore set forth, on, to wit, the 21st of October, 1885, remitted to this defendant by mail for the credit of said Israel & Company the sum of $7,000, and charged in regular course of business the said amount against the general open account of said Israel & Company with said bank at Fort Worth.

This defendant, further answering said bill of complaint,
11 on information and belief, admits that on or about the 20th day of October, 1885, the said Israel & Company were advised by said bank at Fort Worth of the payment of said Sugg check, but this defendant, on information and belief, denies that the said Israel & Company received then or at any other time any advice that the proceeds of said check had been remitted to this defendant. On the contrary, as this defendant avers on information and belief, it only received information at or about said date of the payment of said check and credit given Israel & Company on account of said amount.

This defendant, further answering said bill on information and belief, admits that on said 20th of October, 1885, said Israel & Com-

pany drew at the direction of said Archibald the check set out in said bill of complaint to the order of complainant and delivered it to said Archibald, who on said date forwarded it by mail to the complainant at Winfield, Kansas, but as to whether or not said check was intended as part or full payment by said Archibald to said complainant of the money so as aforesaid collected by him, the said Archibald, this defendant has no knowledge. This defendant, however, on information and belief, avers that when said Israel & Company were advised of the payment of said Sugg check, as hereinbefore stated, they drew said check at the request of said Archibald in favor of said complainant and debited on their books the collection account aforesaid with $12,500.00, placing by like direction of said Archibald $1,150.00 to the individual credit of said Archibald, he claiming that he was entitled to said $1,150.00 as an agreed commission for his services.

This defendant, further answering said bill of complainant, admits that after said complainant received said check
12 through the mail from said Archibald he forwarded it through the Citizens' National Bank of Kansas City, Missouri, and through it to the St. Louis National Bank of St. Louis, Missouri, for collection, and that it was forwarded as expeditiously as the mails between said points would permit.

This defendant, further answering said bill on information and belief, admits that the said St. Louis National Bank presented said check for payment to this defendant on Monday, the 26th day of October, 1885, at ten and one-quarter o'clock a. m., and that payment was refused on the ground, among other reasons, as this defendant avers, that the said Israel & Company, the drawers of said check, had, on the 24th of October, 1885, made an assignment under the laws of the State of Texas for the benefit of creditors, and directed this defendant to hold all funds to order of said assignee, S. Davidson, of which fact this defendant had been advised by telegram from said C. W. Israel & Company, which telegraphic message this defendant avers it had in fact received on the morning of the 25th day of October, 1885, from said Israel & Company and before said Schuler check was presented for payment.

This defendant, further answering said bill of complaint, says that it has no information sufficient to form a belief as to whether or not, as alleged in said complainant's bill, the said St. Louis National Bank caused the said last-named check to be duly protested for nonpayment, or whether or not the said bank duly notified said drawers of said check of the said presentment, demand, and refusal to pay the same, and therefore this defendant calls for strict proof of said alleged protest and notice, if in anywise relevant or material in this case, although this defendant is advised by its counsel that it is wholly immaterial in this case whether said protest was
13 made or said notice given or not.

This defendant, further answering said bill of complaint, admits that it was the business correspondent of the said Israel & Company at the time that said check was drawn and up to the time of the making of said assignment, and had been for a long time previous

thereto—that is, as this defendant avers, the said Israel & Company kept at the date of the drawing of said check and at the date of said assignment a bank account or accounts with this defendant, depositing to the credit of said account and drawing against the same from time to time.

This defendant, further answering said bill of complaint, denies that at the time said check was drawn and at the time it was presented to this defendant for payment there was on the books of this defendant to the credit of said Israel & Company on general open account more than $10,000.00, but there was to the credit of the said C. W. Israel & Company $5,912.41.

This defendant, further answering said bill of complaint, denies that in equity or good conscience the funds to the credit of said Israel & Company in this defendant's bank, or any part thereof, ought to be applied to the payment of said check, interest, damages, or costs. On the contrary, this defendant avers the said drawing of said check did not operate, either in law or equity, to transfer to the said complainant any interest capable of being enforced against this defendant unless this defendant had accepted said check, which it did not do.

This defendant, further answering said bill of complaint, avers and charges the fact to be that on and for a long time before the 24th of October, 1885, one J. N. Israel, a citizen of Texas, residing at the city of Henrietta, in the county of Clay, in said State,
14 was engaged at the said city of Henrietta in a general banking business under the name of C. W. Israel & Company, being the same banking concern heretofore referred to, and also was engaged in a like business at Harold, in said State, under the name and style of Exchange Bank of Harold, and also engaged in a like business at Wichita Falls, in said State, under the name and style of Exchange Bank of Wichita Falls; that on said 24th day of October, 1885, the said J. N. Israel had to his credit under the said name of C. W. Israel & Company the sum of $5,912.41, and to his said credit under the name and style of Exchange Bank of Harold the sum of $1,927.33, and to his credit under the name and style of Exchange Bank of Wichita Falls the sum of $10,013.15, which said amounts stood formally on the books of this defendant in said manner on the said 26th day of October, 1885, when said check was presented, and in the same way at the close of banking hours October 24th, 1885. This defendant, however, avers the truth to be that said amounts were kept separate and distinct on its books, and checks drawn by said J. N. Israel were always drawn against said accounts as though they were owned by separate individuals.

This defendant, further answering, avers and charges the truth to be that on the 25th of July, 1885, the said C. W. Israel & Company made, executed, and delivered their note for $6,500.00, payable in ninety days from its date to said Laclede Bank for discount and credit, which was done about said date, and the proceeds thereof were, less usual discount rates, passed to the credit of said C. W. Israel & Company; that before said note fell due said C. W. Israel & Company had asked defendant whether or not it would renew said note,

and this defendant had answered that it would, believing at the time that said C. W. Israel & Company were solvent, and having no
15 information to the contrary; that on the said morning of the 24th of October the said bank received from said C. W. Israel & Company, by mail, for discount and credit in renewal of said note of $6,500, a note of said C. W. Israel & Company for $6,500, dated the 24th of October, 1885, payable in ninety days from its date. Upon receiving said note on said 24th of October this defendant, in good faith, charged up said note of July 25th against the account of said C. W. Israel & Company, with the intention at that time to accept and discount said renewal note; but said discount was not finally made, for the reason that this defendant received information on said 24th of October which led it to believe that said C. W. Israel & Company might be in financial trouble, and final action on said renewal note was withheld until this defendant could be assured that the disquieting rumors it had received were not well founded.

That in the meantime, on said 24th of October, 1885, about one o'clock p. m., the said J. N. Israel made the assignment hereinbefore set forth, and on the same day said C. W. Israel & Company sent a night telegraphic message to this defendant in words and figures as follows:

HENRIETTA, TEXAS, 24 (meaning 24th of October).

Laclede Bank, St. L.:

We assigned this day in favor of S. Davidson; hold funds subject to his order.

C. W. ISRAEL & COMPANY.

Said telegram was received at St. Louis, Missouri, on the morning of the 25th, the next day, but as that day was Sunday it was not received by this defendant until eight o'clock a. m. October 26th, when it was received by J. T. Birch, cashier of this defendant, which
16 telegram, this defendant charges, amounted to and was a complete revocation of said Schuler check, as well as all other checks drawn against this defendant by said C. W. Israel & Company.

This defendant, further answering, avers and charges the truth to be that said Schuler check was not presented for payment to said Laclede Bank until ten and one-quarter o'clock a. m., when payment was refused. Said notes, dated July 25, 1885, and October 24th, 1885, were and are in words and figures as follows:

"$6,500.00. ST. LOUIS, *July 25th*, 1885.

"Ninety days after date we promise to pay to the order of the Laclede Bank sixty-five hundred dollars for value received, negotiable and payable without defalcation or discount at the Laclede Bank, St. Louis, Mo., with interest at the rate of ten per cent. per annum after maturity, having deposited in said bank, as collateral security for this and other loans, three promissory notes—one, dated Henrietta, Texas, July 1st, 1885, due ninety days from date, for $1,545.00, with 12 per cent. interest after maturity, signed J. W. Welborne and

R. D. Welborne, and one for $2,306.25, dated July 15th, 1885, due ninety days after date, with 12 per cent. interest after maturity, signed by G. W. Baker, and one for $2,413.00, dated September 18th, 1884, due twelve months after date, with ten per cent. interest from date, signed by S. S. Maddox, Jno. W. Maddox, and F. M. Maddox; also four warrants, issued by Clay county, Texas—Nos. 1, 2, 3, & 4—and amounting to $1,700.00, with interest from date at the rate of 8 per cent., which we hereby authorize said bank, or its president or cashier, to sell without notice, at the Merchant's Exchange, in the city of St. Louis, or at public or private sale, at the option of said bank, or of its president or cashier, in case of the non-per-
17 formance of this promise, applying the proceeds to the payment of notes or evidences of debt held by said bank, including interest, and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the said bank the amount thereof forthwith, after such sale, with interest, as above specified. The present cash market value of the above collateral security is about eight thousand dollars; and it is understood and agreed that, should there be any depreciation in the value of said security prior to the maturity of any note or claim held by said bank, such an amount of additional security shall be furnished by us as will be satisfactory to said Laclede Bank; and should such additional security not be furnished within twenty-four hours after demand on us so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

"18884. Oct. 26.

"C. W. ISRAEL & CO."

"$6,500.00. ST. LOUIS, MO., *Oct. 24th*, 1885.

"Ninety days after date we promise to pay to the order of the Laclede Bank sixty-five hundred dollars, for value received, negotiable and payable without defalcation or discount, at the Laclede Bank, at St. Louis, Mo., with interest at the rate of ten per cent. per annum after maturity, having deposited in said bank as collateral security for this and other loans one promissory note dated September 28th, 1885, at Henrietta, Texas, and payable at same place twelve months after date, for $8,383.44, signed by John P. Hardwicke and secured by lien on 17,712 acres of land in Roberts county, Texas; also four warrants issued by Clay county, Texas, Nos. 1, 2, 3, and 4, amount-
ing to $1,700.00, and interest from date at the rate of 8 per
18 cent. per annum, due January 1st, 1886, which we hereby authorize said bank, or its president or cashier, to sell without notice, at the Merchants' Exchange in the city of St. Louis, or at public or private sale, at the option of said bank, or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the payment of notes or evidences of debt held by said bank, including interest, and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the said bank the amount thereof forthwith after such sale, with interest as above specified. The present cash market value of the above collateral security is ten thousand dollars; and it is understood and agreed, should there

be any depreciation in the value of said security prior to the maturity of any note or claim held by said bank, such an amount of additional security shall be furnished by us as will be satisfactory to said Laclede bank; and, should such additional security not be furnished within twenty-four hours after demand on us so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

"19568. January 25.

"C. W. ISRAEL & CO."

This defendant further avers that said collateral notes referred to in said notes have not been returned to said C. W. Israel & Company or to said J. T. Craig, assignee, for the reason that on said 26th of October, 1885, the said Schuler and other creditors of said C. W. Israel & Company brought attachment suits against said C. W. Israel & Company in the State circuit court of St. Louis, and on, to wit, the same day, garnisheed this defendant as to all money and property in its hands or possession or control, which suits are still pending, or the most important of them, particularly said complainant's.

19 This defendant further avers that while said collateral notes referred to in said notes were, as this defendant is informed and believes, wholly worthless and of no value, and neither was said note of the 25th of July discounted by this defendant on the faith of the same or with any knowledge of their value, but solely on the credit given to said Israel & Company, who for a long time kept a good bank account with this defendant, and had discounted many notes before, which had always been promptly paid; and neither had this defendant promised said C. W. Israel & Company to discount said renewal note, dated the 24th of October, or any credit given by this defendant to any collateral to be pledged therewith, but solely on the faith it had in said C. W. Israel & Company, and the credit given to said banking concern.

This defendant further avers that the said $7,000.00 so as aforesaid remitted by said bank at Fort Worth was received by this defendant on the said morning of the 24th of October, in eastern exchange, the net proceeds of which, viz., $6,994.75, was placed by this defendant, on said 24th of October, to the credit of said account of C. W. Israel & Company on its books.

This defendant, further answering said bill of complaint on information and belief, avers and charges the truth to be that on the 24th of October, 1885, the said J. N. Israel, being wholly insolvent, made, executed, and delivered a general deed of assignment to one S. Davidson, a citizen of Texas and resident of said Clay county, which was duly acknowledged, certified, and recorded in the office of the clerk of the county court of said Clay county on said 24th of October, 1885, at one o'clock p. m. of that day, which said conveyance and deed of assignment is fully set forth in the separate answer of J. T. Craig, to which this defendant craves leave to

20 refer as part of this answer, and hereby makes the same part of its answer as fully as though literally copied herein.

This defendant, further answering, avers and charges the truth to be that said Israel made and filed an inventory in the office of the clerk of the said county court of said Clay county, which inventory is filed with the separate answer of J. T. Craig and marked Exhibit "A" to said answer. This defendant prays leave to refer to the same and prays that the same be taken and considered as part of this answer to the same extent as though literally incorporated herein.

This defendant, further answering said bill of complaint, avers that said Davidson failed and refused to qualify and give bond as such assignee within the time prescribed by the laws of Texas, whereupon, as this defendant avers on information and belief, on, to wit, the 30th day of October, 1885, the county judge of said county of Clay did duly appoint the said J. T. Craig, codefendant herein, assignee of said Israel in the place and stead of said Davidson, with all the rights, powers, and duties which, by said conveyance belonged or were imposed on said Davidson by said conveyance, if he had qualified according to law; said order, however, providing that said Craig should execute a bond with sureties according to law, to be approved and filed in conformity to the laws of said State.

And this defendant avers, on information and belief, that on the same day of his appointment the said Craig executed the necessary bond with sureties, which said bond was, on the 2nd day of November, 1885, duly approved by said court or judge, and the same duly filed. Copies of said order of appointment, with bond, are filed with said Craig's separate answer, marked Exhibits "B" & "C"
21 thereto. This defendant craves leave to refer to the same, and prays that both be taken and considered as part of this answer.

This defendant avers, on information and belief, and charges the truth to be, that the said Craig immediately after the execution and approval of said bond took possession of the assets and property, so as aforesaid conveyed, and has ever since been duly acting and qualified assignee of said J. N. Israel, theretofore doing business as aforesaid.

This defendant, further answering said bill, avers and charges the truth to be that on, to wit, August 24th, 1885, said J. N. Israel, under the said name and style of C. W. Israel & Company, made, executed, and delivered to this defendant his certain promissory note in writing of that date by which he promised to pay, ninety days after date, to the order of this defendant, the sum of $2,500.00, which said note, at or near said date, was delivered to this defendant, and, at the request of the said C. W. Israel & Company, discounted at the usual bankable rates of eight per cent., and the proceeds passed to the credit, on the books of this defendant, of said C. W. Israel & Company. This defendant avers that since said assignment, under the direction of said assignee, the said note was charged against the money of said J. N. Israel, so as aforesaid, to his credit in said bank. Said note is in words and figures as follows:

"$2,500. ST. LOUIS, MISSOURI, *Aug.* 24th, 1885.

"Ninety days after date we promise to pay to the order of the

Laclede Bank twenty-five hundred dollars, for value received, negotiable and payable without defalcation or discount at the Laclede Bank, St. Louis, Missouri, with interest at the rate of ten per cent. per annum after maturity, having deposited in said *book* as
22 collateral security for this and other loans one promissory note dated Henrietta, Texas, September 18th, 1884, due twenty-four months after date, for $2,413.10 and 10 per cent. interest from date, signed by S. S. Maddox, John W. Maddox, and F. M. Maddox, and one dated Henrietta, Texas, June 1st, 1885, due six months after date, for $1,275, and signed by W. C. Black and W. B. Blimons, and secured by a deed of trust on sheep and 641 acres of land, which we hereby authorize said bank or its president or cashier to sell without notice, at the Merchants' Exchange in the city of St. Louis, or at public or private sale, at the option of said bank or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the payment of notes or evidences of debt held by said bank, including interest, and accounting to us for the surplus, if any. In case of deficiency we promise to pay for the said bank the amount thereof forthwith after such sale, with interest as above specified. The present cash market value of the above collateral security is thirty-seven hundred dollars, and it is understood and agreed, should there be any depreciation in the value of said security prior to the maturity of any note or claim held by said bank, such an amount of additional security shall be furnished by us as will be satisfactory to said Laclede Bank, and should such additional security not be furnished within twenty-four hours after demand on us so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

"(Signed) C. W. ISRAEL & COMPANY."

This defendant, further answering said bill, charges the truth to be that on, to wit, September 9th, 1885, the said J. N. Israel,
23 under his said name and style of C. W. Israel & Company, made, executed, and delivered to this defendant, on or about said date, his certain other promissory note, by which he promised to pay, ninety days after date, for value received, to this defendant, the sum of $8,000, which said note was received by this defendant at or near said date, and, at the request of said C. W. Israel & Company, discounted at the usual bankable rate of eight per cent., and the proceeds thereof were passed to the credit of said C. W. Israel & Company on the books of this defendant. This defendant avers that since the date of said assignment, under the direction of said J. T. Craig, it charged the same against the money and funds in its hands as aforesaid to the credit of said J. N. Israel. Said note is in words and figures as follows, to wit:

"$8,000. ST. LOUIS, MISSOURI, *Sept.* 9, 1885.

"Ninety days after date we promise to pay to the order of the Laclede Bank eight thousand dollars for value received, negotiable and payable, without defalcation or discount, at the Laclede Bank, St. Louis, Missouri, with interest at the rate of ten per cent. per an-

num after maturity, having deposited in said *book* as collateral security for this and other loans one promissory note, dated Henrietta, Texas, May 20th, due six months after date at Henrietta, Texas, for $10,000.60, with 12 per cent. interest after maturity, signed by J. L. Huggins and secured by two deeds of trust, one on 1,535 acres of land in Clay county, Texas, and one on 2,000 head of cattle and 45 head of horses, located in Clay county, Texas, and branded H & —, which we hereby authorize said bank or its president or cashier to sell, without notice, at the Merchants' Exchange, in the city of St. Louis, or at public or private sale, at the option of said bank or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the payment
24 of notes or evidences of debt held by said bank, including interest, and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the said bank the amount thereof forthwith, after such sale, with interest as above specified. The present cash market value of the above collateral security is ten thousand dollars, and it is understood and agreed, should there be any depreciation in the value of said security prior to the maturity of any note or claim held by said bank, such an amount of additional security shall be furnished by us as will be satisfactory to said Laclede Bank; and should such additional security not be furnished with-twenty-four hours after demand on us so to do then, and in that event, said bank may proceed at once to sell as above specified the security herein named.

"(Signed) C. W. ISRAEL & COMPANY."

This defendant states that there has been paid on account of said collateral notes the sum of $1,100, and no more, although this defendant has used due diligence to collect the same as they fell due.

This defendant avers that at the time of the execution and delivery of said notes to it by said C. W. Israel & Company and of the discounting of the same there were delivered to it, as collateral security therefor, notes of certain residents and citizens of the State of Texas, as set forth in said notes, secured in some instances by deeds of trust on lands in the State of Texas; but this defendant avers that while said collateral security was taken the said notes were discounted by it on the faith and credit given by it to said J. N. Israel, doing business as aforesaid, as said Israel had under said name and style been a depositor with it for a great many
25 years and had during a greater part of the time large sums of money to his credit on his said accounts and having during said time given many notes and paid them promptly, this defendant having no information at the time as to the value of said notes referred to, or of the persons who executed them, and taken by it as security, but took the same more to comply with formal banking principles than because of any credit given to said collateral; and this defendant avers on information and belief that said collateral notes are of no value as to what has been collected. Said J. N. Israel, at the time said notes were negotiated with it, had to his credit on the account of C. W. Israel & Company, on the

24th of August, 1885, the sum of $3,363.42, and to the credit of the account of the Exchange Bank of Harold the sum of $521.77, and to the credit of the account of — Exchange Bank of Wichita Falls the sum of $5,991.26, and on said September 9th, 1885, had to the credit of the account of said C. W. Israel & Company the sum of $5,076.20, and to the credit of the account of the Exchange Bank of Harold the sum of $2,167.47, and to the credit of the account of the Exchange Bank of Wichita Falls the sum of $6,328.37.

This defendant avers that at the date of said assignment, and ever since, said J. N. Israel has been and is now wholly insolvent and unable to pay the said notes held by this defendant, unless the same are charged against said funds.

This defendant, further answering, avers on information and belief and charges the truth to be that under the laws of the State of Texas, in the event of an assignment such as hereinbefore set forth of said J. N. Israel, the creditors of the assignor are, by express provisions of the Texas statute, allowed to prove their claims, although not due, a rebate being made on the same on account of un-
26 earned interest, and that a creditor proving claims against funds in the hands of an assignee such as the said J. T. Craig must make a distinct statement within six months from the time of the first publication of the notice for the appointment of the assignee, and file the same with such assignee, supported by an affidavit of the creditor, his agent or attorney, that the statement is true, that the debt is just, and that there are no credits or offsets that should be allowed against the claim.

Said sections of the Texas law are as follows:

"SEC. 7. Every creditor consenting to an assignment shall, within six months from the time of the first publication of the notice of appointment of the assignee, file with such assignee a distinct statement of the particular nature and amount of his claim against the debtor, which shall be supported by an affidavit of the creditor, his agent or attorney, that the statement is true, that the debt is just, and that there are no credits or offsets that should be allowed against the claim, except as shown by the statement, and no creditor shall take any benefit under any assignment whatever who neglects to file such statement."

"SEC. 13. Claims that are not due may be allowed at their present value by discounting them at the rate of interest mentioned in the contract, if any; otherwise at the legal rate; and if any creditor holds collateral security of less value than his debt the value thereof may be estimated by the assignee, and only the difference between such sum and the debt shall be allowed."

Wherefore this defendant is advised and so charges the
27 truth to be that it was not such a creditor of said J. N. Israel at the date of said assignment as to make and prove a claim against the funds in the hands of the said assignee on said notes, inasmuch as it would have had to have allowed, as credits and offsets against the same, the amount of the funds so as aforesaid in its hands to the credit of said several accounts. The premises con-

sidered this defendant claims that, upon said assignment being made, it had the right, in law and equity, to set off its said notes against said funds and to retain said funds until the maturity of said notes.

And this defendant denies all and all manner of unlawful combination and conspiracy whereby it is by said bill charged, without this, that every other matter, cause, and thing in the complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true to the best of the knowledge and belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

BOYLE, ADAMS & McKEIGHAN,
Solicitors for said Laclede Bank.

UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis:

Walter Trask, being duly sworn, deposes and says that he is cashier of said Laclede Bank, and that the matters and things set forth in the foregoing answer and the denials therein contained, as far as they purport to be stated of defendant's own knowl-
28 edge, are true, and so far as they purport to be stated on information and belief affiant believes them to be true.

WALTER H. TRASK.

Subscribed and sworn to before me this 26th day of March, 1886.
A. P. SELBY, *Clerk.*

And afterwards, to wit, on the 26th day of March, A. D. 1886, there was filed in said cause the separate amended answer of J. T. Craig, in words and figures following, to wit:

Separate Amended Answer of J. T. Craig.

In the Circuit Court of the United States, Eastern District of Missouri.

HARRISON B. SCHULER, Complainant,
vs.
LACLEDE BANK and J. T. CRAIG, Defendants.

The separate amended answer of J. T. Craig to the bill of complaint of Harrison B. Schuler.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, want of equity, failure to state ground for relief either at law or in equity, uncertainties, and other imperfections in the said bill contained, for amended answer thereto, leave of court having been first obtained, or to so much and such parts thereof as this defendant is advised it

is material or necessary for him to make answer unto, answering, says: That he admits, as charged in said bill, that he is a citizen of the State of Texas; that complainant is a citizen of the State
29 of Kansas, and that he claims to be and is the assignee under the laws of the State of Texas of C. W. Israel & Company and the voluntary conveyance under said laws hereinafter to be set out by said C. W. Israel & Company; and this defendant further admits that he claims, as assignee, the funds in the hands of his codefendant, the Laclede Bank, on open and general account, subject only to the claims and rights of said bank in and to the same.

This defendant, further answering said bill of complaint, admits that one G. A. Archibald, of the city of Henrietta, in the State of Texas, on or about the 16th day of October, 1885, had in his hands for collection a certain note belonging to the complainant for the sum of twenty-five thousand dollars before that time executed and delivered to complainant by one E. C. Sugg, of said State of Texas.

This defendant, further answering, admits that said Sugg drew his certain check for the sum of twelve thousand five hundred dollars on the State National Bank of Fort Worth, Texas, and delivered it to said Archibald, payable, however, to the order of said C. W. Israel & Company instead of said Archibald, the amount thereof to be credited on said note when paid by said bank at Fort Worth; but this defendant states the truth to be that said check was drawn by said Sugg and dated on the 16th of October, 1885, instead of October 18th, as alleged in said bill.

This defendant, further answering, admits that said Archibald deposited said check for collection with C. W. Israel & Company, bankers, at Henrietta, Texas, and that said C. W. Israel & Company forwarded the same to said State National Bank at Fort Worth, Texas, but this defendant states that said check was forwarded
30 on the 16th of October, 1885, instead of the 18th of October, as charged in said bill.

This defendant, further answering, denies that in forwarding said check as aforesaid or at any time the said C. W. Israel & Company instructed said bank at Fort Worth (in case said check should be paid) to remit the proceeds, or the greater part thereof, or any part thereof, to the said Laclede Bank, codefendant herein, for the account and credit of the said C. W. Israel & Company. On the contrary, this defendant avers the truth to be that said C. W. Israel & Company on, to wit, the said 16th day of October, 1885, received said check for collection from said Archibald, and it was by his direction credited by said C. W. Israel & Company to collection account on the books of said Israel & Company until it should be heard from; that afterwards and on said date, to wit, October 16th, 1885, the said Israel & Company sent said check by mail to said State National Bank at Fort Worth, Texas, for credit of themselves without further instructions, and the amount of said check was by said bank at Fort Worth passed to the credit of said Israel & Company on its books on, to wit, the 17th of October, 1885, the account of said C. W. Israel & Company at the time of receiving said check being overdrawn to the amount of about $340.00, as this defendant is in-

formed and believes, and so alleges the truth to be; that on, to wit, October 19th, 1885, the said Israel & Company directed by letter the said bank at Fort Worth, the said latter bank being then and there the regular correspondent of said Israel & Company, as this defendant alleges, to remit to the said Laclede Bank the sum of seven thousand dollars and to charge the same against the account of Israel & Company, but said sum was not ordered to be remitted out
31 of the proceeds of said Sugg check, or any other specific fund, but only in the regular course of business between said banks, and also at the same time directed the said bank at Fort Worth to remit in currency $5,000.00, which was done to the Exchange Bank of Wichita Falls, hereinafter referred to, and said Exchange Bank, by direction of said C. W. Israel & Company, remitted to the said Laclede Bank the sum of $3,500.00, which was done by its check in favor of said Israel & Company, which was received by said Laclede Bank on October 21st and debited to account of Exchange Bank and credited to account of Israel & Company.

This defendant, further answering said bill of complaint, admits that said bank at Fort Worth paid said Sugg check, but only, as this defendant avers, on information and belief, in manner and form as he has hereinbefore stated.

This defendant denies that said bank at Fort Worth, in accordance with instructions of said Israel & Company, remitted the proceeds of said check, or the greater part thereof or any part, to said Lalcede Bank for the credit of said Israel & Company, or that any such remittance was received on or about the 20th of October, 1885, or any other time. On the contrary, this defendant, on information and belief, charges the truth to be that said bank at Fort Worth, in compliance with the direction given by said Israel & Company, as hereinbefore set forth, on the 19th day of October, 1885, on, to wit, the 21st of October, 1885, remitted to said Laclede Bank by mail for the credit of said Israel & Company the sum of seven thousand dollars and charged in regular course of business the said amount against the general account of said Israel & Company with said bank at Fort Worth.

This defendant, further answering said bill of complaint,
32 admits that on or about the 20th of October, 1885, the said Israel & Company were advised by said bank at Fort Worth of the payment of said Sugg check, but this defendant denies that the said Israel & Company received then or at any other time any advices that the proceeds of said check had been remitted to said Laclede Bank. On the contrary, as this defendant avers, on information and belief, it only received information at or about said date of the payment of said check and the credit given Israel & Company on account of the said amount.

This defendant, further answering said bill, admits that on said October 20th, 1885, said Israel & Company drew, at the direction of said Archibald, the check set out in said bill of complaint to the order of complainant and delivered it to said Archibald, who, on said date, forwarded it by mail to the complainant at Winfield, Kansas, but as to whether or not said check was intended as part or full

payment by said Archibald to said complainant of the money so as aforesaid collected by him, the said Archibald, this defendant has no personal knowledge. This defendant, however, on information and belief, avers that when said Israel & Company were advised of the payment of the Sugg check, as hereinbefore stated, they drew said check in favor of complainant at the request of said Archibald, and debited on their books the collection account with $12,500, and placed by like direction of said Archibald the sum of $1,150.00 to the individual credit of said Archibald, he claiming that he was entitled to said $1,150.00 as an agreed commission for his services.

This defendant, further answering said bill of complaint, admits that after said complainant received said check through the mail from said Archibald he forwarded it through the Citizens' National Bank of Kansas City, Missouri, and through it to the St. Louis
33 National Bank of St. Louis for collection, and that it was forwarded as expeditiously as the mails between the said points would permit.

This defendant, further answering, admits that the said St. Louis National Bank presented said check for payment to the said Laclede Bank on Monday, the 26th day of October, 1885, at ten and one-quarter o'clock a. m., and that payment was refused upon the ground, among other reasons, as this defendant avers, on information and belief, that the said Israel & Company, the drawers of said check, had, on the 24th of October, 1885, made an assignment to one S. Davidson, under the laws of the State of Texas, for the benefit of creditors, and directed said Laclede Bank to hold all funds to order of said assignee, of which fact it, the said Laclede Bank, had been advised by telegraph; which telegraphic information this defendant, on information and belief, avers had, in fact, been received by said Laclede Bank on the 24th day of October, 1885, from said Israel & Company.

This defendant, further answering said bill of complaint, says that he has no information sufficient to form a belief as to whether or not, as alleged in said complainant's bill, the said St. Louis National Bank caused the said last-named check to be duly protested for non-payment, or whether or not said bank duly notified said drawers of said check of the said presentment, demand, and refusal to pay said check, and therefore this defendant calls for strict proof of said alleged protest and notice, if in anywise relevant or material in this case, although this defendant is advised by his counsel that it is wholly immaterial whether said protest was made or said notice given or not.

This defendant, further answering said bill of complaint,
34 admits that the said Laclede Bank was the business correspondent of the said Israel & Company at the time said check was drawn to it for payment, and had been for a long time prior thereto; that is, as this defendant avers, on information and belief, and so charges the truth to be, the said Israel & Company kept at the date of the drawing of said check and for a long time before a bank account or accounts with said Laclede Bank, de-

positing to the credit of said account or accounts and drawing against the same from time to time.

This defendant, further answering said bill of complaint, denies that at the time said check was presented for payment to said Laclede Bank there was, as alleged in complainaut's bill, to the credit of said Israel & Company, more than ten thousand dollars; there was, however, formerly on the books of said bank, to the credit of said C. W. Israel & Company, when said check was so presented, the sum of $5,912.41 and no more.

This defendant avers that at the date of the drawing of said check in favor of said Schuler, and long before, one J. N. Israel, a citizen of the said State of Texas, residing in the city of Henrietta and county of Clay, in said State, was engaged at said city of Henrietta in a general banking business under the said name and style of C. W. Israel & Company, being the same banking concern hereinbefore referred to, and also was engaged in a like business at Harold, in said State, under the name and style of Exchange Bank of Harold, and also in a like business at Wichita Falls, in said State, under the name and style of Exchange Bank of Wichita Falls, and each of said banking concerns conducted as aforesaid by said J. N. Israel kept at said dates and long before separate bank accounts with said Laclede Bank in their said several names and styles, and each of said accounts was kept with said Lacede Bank and drawn against by drafts and checks in all respects as separate
35 and distinct as though owned and kept by separate persons, and said accounts were so kept down to and including the date of the assignment of J. N. Israel hereinafter set forth.

This defendant, further answering, avers on information and belief, and so charges the truth to be, that at the close of business hours on the 24th of October, 1885, there was to the credit of said C. W. Israel & Company's account on the books of said Laclede Bank the said sum of $5,912.41 and no more; to the credit of said Exchange Bank of Harold, $1,927.53 and no more; to the credit of said Exchange Bank of Wichita Falls, $10,013.15 and no more, which was also the condition of said accounts on the bank books when said Schuler's check was presented to said Laclede Bank on the 26th of October, 1885.

This defendant, further answering, avers on information and belief, and charges the truth to be, that on the 25th of July, 1885, the said C. W. Israel & Company made, executed, and delivered their note for $6,500.00, payable in ninety days after its date to said Laclede Bank for discount and credit, which was done about said date, and the proceeds thereof, less discount at the regular banking rates of interest, were passed to the credit of said C. W. Israel & Company on the books of the bank; that before said 24th of October the said C. W. Israel & Company requested said bank to renew said note by another note of a like amount by the same makers, payable in ninety days, and said Laclede Bank, believing that said C. W. Israel & Company were solvent, and having no information to the contrary, had consented to comply with said request; that on the said morning of the 24th of October the said bank received for discount and credit

from said C. W. Israel & Company by mail said renewal note for $6,500.00, dated the 24th of October, 1885, executed by said
36 C. W. Israel & Company. Said bank on said 24th of October charged up said note of $6,500.00, dated the 25th of July, 1885, with the intention at that time of discounting said renewal note, but said discount was not finally made, because during the day the said bank received information which led its officers to believe that said C. W. Israel & Company were in trouble, and final action was withheld on said renewal note until the bank could be assured that the disquieting rumors were not well founded; that on said 24th of October, 1885, the said J. N. Israel made the assignment hereinafter set forth, and on the same day sent a night telegraphic message to said bank in words and figures as follows:

HENRIETTA, TEXAS, 24 (meaning 24th October).

Laclede Bank, St. L.:

We assigned this day in favor of S. Davidson. Hold funds subject to his order.

C. W. ISRAEL & CO.

That said telegram was received at St. Louis, Missouri, at the telegraph office on the morning of the 25th, the next day, but, as that day was Sunday, it was not received by the said bank until 8 o'clock a. m., October 26th, when it was received by J. T. Birch, the cashier of said bank. This defendant is advised, and so charges the truth to be, that said telegram so received operated from that time as a revocation of said Schuler check as well as all others.

This defendant further avers, on information and belief, that said Schuler check was not presented for payment to said Laclede Bank until about ten and one-quarter o'clock, when payment was
37 refused. This defendant states that said notes dated the 25th of July, 1885, and the 24th of October, 1885, were in words and figures as follows, to wit:

$6,500.00. ST. LOUIS, MO., *July 25th*, 1885.

Ninety days after date we promise to pay to the order of the Laclede Bank sixty-five hundred dollars for value received, negotiable and payable without defalcation or discount at the Laclede Bank, St. Louis, Mo., with interest at the rate of ten per cent. per annum after maturity, having deposited in said bank, as collateral security for this and other loans, three promissory notes—one, dated Henrietta, Texas, July 1st, 1885, due ninety days from date, for $1,545.00, with 12 per cent. interest after maturity, signed by J. W. Welborne and R. D. Welborne, and one for $2,306.25, dated July 15th, 1885, due ninety days after date, with 12 per cent. interest after maturity, signed by G. W. Baker, and one for $2,413.00, dated September 18th, 1884, due 12 months after date, with 10 per cent. interest from date, signed by S. S. Maddox, Jno. W. Maddox, and F. Maddox; also four warrants, issued by Clay county, Texas—Nos. 1, 2, 3, & 4—amounting to $1,700, with interest from date at the rate of 8 per cent., which we hereby authorize said bank, or its president or cashier, to sell

without notice, at the Merchants' Exchange in the city of St. Louis, or at public or private sale, at the option of said bank, or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the payment of notes or evidences of debt held by said bank, including interest, and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the said bank the amount thereof forthwith after such sale, with interest as above specified. The present cash market value of the above
38 collateral security is about eight thousand dollars, and it is understood and agreed should there be any depreciation in the value of said security prior to the maturity of any note or claim held by said bank such an amount of additional security shall be furnished by us as will be satisfactory to said Laclede Bank, and should such additional security not be furnished within twenty-four hours after demad on us so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

(Signed) C. W. ISRAEL & COMPANY.

$6,500.00. ST. LOUIS, MO., *Oct. 24th*, 1885.

Ninety days after date we promise to pay to the order of the Laclede Bank sixty-five hundred dollars for value received, negotiable and payable without defalcation or discount at the Laclede Bank, St. Louis, Mo., with interest at the rate of ten per cent. per annum after maturity, having deposited in said bank, as collateral security for this and other loans, one promissory note, dated September 28th, 1885, at Henrietta, Texas, and payable at same place twelve months after date, for $8,383.44, signed by John P. Hardwick and secured by lien on 17,712 acres of land in Roberts county, Texas; also four warrants, issued by Clay county, Texas—Nos. 1, 2, 3, & 4—amounting to $1,700, and interest from date at the rate of 8 per cent. per annum, due January 1st, 1886, which we hereby authorize said bank, or its president or cashier, to sell without notice, at the Merchants' Exchange in the city of St. Louis, or at public or private sale, at the option of said bank, or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the pay-
39 ment of notes or evidences of debt held by said bank, including interest, and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the said bank the amount thereof forthwith after such sale, with interest as above specified. The present cash market value of the above collateral security is ten thousand dollars, and it is understood and agreed should there be any depreciation in the value of said security prior to the maturity of any notes or claim held by said bank such an amount of additional security shall be furnished by us as will be satisfactory to said Laclede Bank, and should such additional security not be furnished within twenty-four hours after demand on us so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

(Signed) C. W. ISRAEL & CO.

This defendant further avers on information and belief, and so charges the truth to be, that the collateral referred to in said notes have not been returned to said Israel & Company or this defendant by said Laclede Bank, because said Schuler, on said 26th of October, and other creditors of said Israel & Company, brought attachment suits against said Israel & Company in the circuit court of the city of St. Louis and garnished all funds and property in the said bank's hands belonging to said Israel & Company, which suits are still pending and undetermined.

Said defendant further avers on information and belief, and so charges the truth to be, that on the morning of the 24th of October, 1885, said Laclede Bank received from the bank at Fort Worth said remittance of $7,000 in eastern exchange, the net proceeds of which, viz., $6,994.00, it passed to the credit of said C. W. Israel & Company's account on the same day.

40 This defendant, further answering said bill of complaint, denies that in equity or good conscience the funds to the credit of said Israel & Company in said Laclede Bank, or any part thereof, ought to be applied to the payment of said check, interest, damages, or costs. On the contrary, this defendant avers that the said drawing of said check did not operate, either in law or equity, to transfer to said complainant any interest capable of being enforced against the said Laclede Bank, unless said bank had accepted said check, which it did not do. Neither in any event should any part of the money in said Laclede Bank to the credit of said accounts of Exchange Bank of Harold and Exchange Bank of Wichita Falls be applied to the payment of said check.

This defendant, further answering said bill of complaint, avers that on, to wit, the 24th of October, 1885, the said J. N. Israel, being wholly insolvent, made, executed, and delivered a general deed of assignment under and in conformity with the laws of the State of Texas with respect to such conveyances, which was duly acknowledged, certified, and recorded in the office of the clerk of the county court of said Clay county on said 24th of October, 1885, at one o'clock p. m. of that day, which said instrument conveyed to one S. Davidson, a citizen of Texas and a resident of said Clay county, all the property and assets of every kind and description of said Israel, wherever situate, for the benefit of his, the said Israel's, creditors, which said conveyance was and is in words and figures as follows:

"THE STATE OF TEXAS, }
"*County of Clay,* } ss:

"Know all men by these presents that whereas we, C. W. Israel & Company, a firm composed of J. N. Israel, who resides in Clay
41 county, Texas, doing and carrying on a general banking and exchange business in Henrietta, Clay county, Texas, and Wichita Falls, Wichita county, Texas, and at Harold, Wilbarger county, Texas, said business at Henrietta being carried on under the firm name and style of C. W. Israel & Company, and said business being carried on at Wichita Falls under the firm name and style of Exchange Bank of Wichita Falls, and said business being carried on

at Harold under the firm name and style of Exchange Bank of Harold; and being indebted to various and divers persons and firms, as is shown by inventory and list to be attached to this deed of assignment and marked Exhibit A and made a part hereof, said inventory and list containing and to contain a full and true list and account of all creditors of said firm, the place of residence of such creditors, and the nature of each debt or demand, whether arising on written security, evidence, or otherwise executed or upon open account, the true cause and consideration of such indebtedness in each case, and the place where such indebtedness arose, a statement of any existing mortgage, collateral judgment, or other security for the payment of any such debt which the said C. W. Israel & Company *or* unable to pay; and whereas they are anxious of disposing of the entire estate of the said C. W. Israel & Company and of the said J. N. Israel, save and except only such property as is exempt from execution, and is not subject to forced sale under the laws of the State of Texas, and all of the assets for the benefit of their said creditors as is mentioned in said inventory hereafter mentioned. Therefore we have this day, in consideration of the sum of one dollar cash in hand paid to me by S. Davidson, who resides in the county of Clay and State of Texas, the receipt of which is hereby acknowledged,
42 and for the uses and purposes and trusts hereafter mentioned, have bargained, sold, assigned, transferred, and conveyed, and do by these presents bargain, sell, assign, transfer, and convey, all of the property, both real and personal, belonging to the said C. W. Israel & Company and to the said J. N. Israel, said property consisting of all property now owned by the said C. W. Israel & Company or by the said J. N. Israel in each of the aforesaid banks in Henrietta, Clay county, Texas, and Wichita Falls, Wichita county, Texas, and Harold, Wilbarger county, Texas, and all evidences of indebtedness, judgments, choses in action, books, accounts, bank furniture and fixtures, safes, vaults, and also any and all real estate situated in the State of Texas and now owned by the said C. W. Israel & Company or the said J. N. Israel, it being hereby intended to include any and all property of any and every description whatever belonging to the said C. W. Israel & Co. or J. N. Israel (whether the same belonged to the said firm [of] C. W. Israel & Company or J. N. Israel) now owned by said firm of C. W. Israel & Co. or J. N. Israel, save and except such property as is by the laws of the State of Texas exempt from forced sale, and it is not intended by this deed to convey any such exempt property. It is understood, however, that the property herein conveyed is conveyed in trust for the benefit of the creditors of the said C. W. Israel & Co., and that the said S. Davidson shall forthwith take possession of the property and effects and demands and accounts hereby assigned and intended to be assigned, and with all reasonable diligence dispose of said property herein conveyed by public or private sale for the best price that can be obtained and convert the same into money, and shall, as soon as possible, collect all the debts, accounts,
43 and demands owing to the said C. W. Israel & Company

and to J. N. Israel as soon as the same can be collected, and may employ for the purpose of effecting such sales and collecting such debts all such assistance as may be necessary in the premises, exercising every other power and precaution that may be needful in the preservation of such goods and property for the carrying out of this trust, and he shall also, as soon as possible, sell, convey, and make good titles to said property to the purchaser or purchasers thereof, said sale or sales to be made at either public or private sales, as may be for the best interest of said above-named creditors, and the said S. Davidson shall appropriate and pay out the proceeds of any sale so made and received by him and of all moneys so collected by him on all debts herein conveyed to him as follows, to wit:

"To all of the creditors of the firm of C. W. Israel & Company, said firm being composed of J. N. Israel, as above set out, and to any other creditors of said C. W. Israel & Company not now known of, and to the payment of all costs that may accrue in carrying out this trust; that the said S. Davidson is to take possession of said property and keep the same open to the inspection of the creditors aforesaid, or any creditor that C. W. Israel & Company may not now know of, and should any person or persons thus have a legal demand against the said C. W. Israel & Company not herein above referred to — hereafter appear or become known, then and in this event he or they shall have the rights of the creditors hereinbefore mentioned in said inventory, and the said S. Davidson is by these presents authorized and required to make a good and sufficient bond, as is required by law, and the said C. W. Israel & Company hereby covenant and agree to adopt all
44 acts done by the said S. Davidson as assignee, and do hereby appoint and constitute the said S. Davidson the lawful agent and assignee and att'y as aforesaid of the said C. W. Israel & Company and of the said above-named creditors, and it is intended that this assignment is made for the benefit of only such creditors of the said C. W. Israel & Company as will and do consent to accept their proportional shares of said estate and discharge said C. W. Israel & Company, and any such creditors so accepting this assignment shall, as provided by law, release and discharge said C. W. Israel & Company from all further liabilities to such consenting creditors on account of their respective claims: Provided, however, That said creditors shall receive as much as one-third of the amount due and allowed in their favor or established by them as a valid claim against the estate of the said C. W. Israel & Company, and the said S. Davidson is required to furnish a full, fair, and complete inventory of all of the property, both real and personal (which said real estate is situated mainly in the counties of Clay and Archer, in the State of Texas), immediately after taking possession of said property, and the said S. Davidson is required and authorized to pay out any and all money that he may receive in the premises to the creditors aforesaid in settlement of the above demands and in settlement

of the costs of executing this trust; and the said Davidson is required to execute this trust as in every respect required by law.

"Witness our hands this the 24th day of October, A. D. 1885.

"C. W. ISRAEL & COMPANY,
"By J. N. ISRAEL.
"J. N. ISRAEL."

45 THE STATE OF TEXAS, }
County of Clay, } ss:

Before me, W. G. Eustis, the undersigned authority, a notary public in and for Clay county, Texas, on this day personally appeared J. N. Israel, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed for C. W. Israel & Company and for himself.

Given under my hand and seal of office this the 24th day of October, A. D. 1885.

[SEAL.]

W. G. EUSTIS,
Notary Public, Clay County, Texas.

STATE OF TEXAS, }
County of Clay, } ss:

I, G. W. Ford, county clerk in and for said county, do hereby certify that the foregoing instrument, dated the 24th day of October, 1885, with its certificate of authentication, was filed for record in my office the 24th day of October, 1885, at 1 o'clock p. m., and duly recorded the 26th day of October, A. D. 1885, at 12 m. in the records of said county, in vol. N, on pages 569, 570, & 571.

Witness my hand and the seal of the county court of said county at office in Henrietta, Texas, the day and year last above written.

G. W. FORD,
Clerk County Court, Clay County, Texas.

Said Israel also, as required by law, made out and filed with said deed of assignment in said office where the said deed was filed an inventory duly verified of his assets and liabilities, which
46 is herewith filed, marked Exhibit "A," and prayed to be taken and considered part of this answer to the same extent as if literally incorporated herein.

This defendant, further answering, avers that said Davidson failed and refused to qualify and give bond as such assignee within the time prescribed by the laws of Texas, whereupon, to wit, the 30th day of October, 1885, the county judges of said county of Clay did duly appoint this defendant assignee of said Israel in the place and stead of said Davidson with all the rights, powers, and duties which by said conveyance belonged or were imposed on said Davidson if he had qualified according to law, provided this defendant should execute a bond with securities according to law, to be approved and filed in conformity with the laws of said State.

And this defendant avers that on the same day of his appointment he executed the necessary bond with sureties, which said bond

was on the 2nd day of November, 1885, duly approved by said court or judge and the same duly filed. Copies of said order of appointment and bond are herewith filed, marked Exhibits "B" & "C," and prayed to be taken and considered as part of this answer.

And this defendant, immediately after the execution and approval of said bond, took possession of the assets and property so as aforesaid conveyed, and has been ever since the duly acting and qualified assignee of said J. N. Israel theretofore doing business as aforesaid.

This defendant further states that on the said 24th day of October, 1885, the said Laclede Bank held for value received certain two promissory notes of said C. W. Israel & Company, amounting to $10,500.00, not then according to their terms matured, which are more particularly set forth in said bank's separate answer,
47 which notes this defendant as said assignee on, to wit, November 12th, 1886, directed said bank to charge against said funds of said J. N. Israel in said bank's hands at the said date of October 24th.

And this defendant denies all and all manner of unlawful combination and conspiracy whereby he is by said bill charged, without this, that every other matter, cause, or thing in the complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true to the best of the knowledge and belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

BOYLE, ADAMS & McKEIGHAN,
Solicitors for J. T. Craig.

UNITED STATES OF AMERICA.

STATE OF MISSOURI, *City of St. Louis:*

J. E. McKeighan, being duly sworn, deposes and says that he is one of the solicitors for J. T. Craig; that the matters and things set forth in the foregoing answer and the denials therein contained are true to the best knowledge and belief of this deponent, who makes this affidavit because of the absence of J. T. Craig from said district and for want of time to send this answer to him for verification in time for filing under order of court.

J. E. McKEIGHAN.

Subscribed and sworn to before me this 26th day of March, 1886.
A. P. SELBY, *Clerk.*

48 And afterwards, to wit, on the 2nd day of April, A. D. 1886, there was filed in said cause a certain stipulation as to the facts in words and figures following, to wit:

Stipulation as to Facts.

H. B. SCHULER, Complainant,
vs.
LACLEDE BANK *et al.*, Def'ts. } In Equity.

Agreed statement of facts.

It is hereby stipulated and agreed (for the purposes of this suit) by and between the complainants and respondents, by their solicitors, that the following are the facts in the controversy:

1st. Plaintiff is a citizen of the State of Kansas. The Laclede Bank, one of the respondents, is a Missouri banking corporation and a citizen in Missouri, and the respondent J. L. Craig is a citizen of the State of Texas.

2nd. That on the 16th day of October, 1885, J. N. Israel was doing a banking business at Henrietta, Texas, under the firm name of C. W. Israel & Co.; at Harold, Texas, under the name of Exchange Bank of Harold; at Wichita Falls, Texas, under the name of Exchange Bank of Wichita Falls.

3rd. That on said 16th day of October, 1885, J. A. Archibald at Henrietta, Texas, had in his hands for collection a note belonging to complainant for the sum of $25,000.00, which note was made by E. C. Sugg; that on the 16th day of October, 1885, said Sugg drew his check for the sum of $12,500.00 on the State National Bank at Fort Worth, Texas, and delivered it to said Archibald, payable to the order of C. W. Israel & Co., for the purpose of being
49 forwarded to the State National Bank at Fort Worth, Texas, and when paid the same to be credited on said note of $25,000.00; that said check was deposited with C. W. Israel & Co. for collection by said Archibald and forwarded to the said National Bank at Fort Worth, Texas, for collection and instructions to notify said Israel & Co. when paid; that said check was paid by said State National Bank of Fort Worth, Texas, on the 17th day of October, 1885, and amount credited to C. W. Israel & Co. on the books of said State National Bank, of which said C. W. Israel & Co. were notified. Said C. W. Israel & Co., at said date, had no funds in the said National Bank at Fort Worth other than the proceeds of this check.

4th. That on the 19th day of October, 1885, said Israel & Co. by letter directed the National Bank at Fort Worth to remit to the Laclede Bank at St. Louis the sum of $7,000.00, and to remit to the Exchange Bank at Wichita Falls $5,000.00 in currency, and by letter directed to the Exchange Bank at Wichita Falls to remit to the Laclede Bank $3,500.00, which sums of $7,000.00 and $3,500.00 were remitted to the Laclede Bank and received by the Laclede Bank on October 21st, 1885, and placed to the credit of C. W. Israel & Co.

5th. That said C. W. Israel & Co. on the 20th day of October, 1885, drew their certain check No. 9950 in favor of complainant for the sum of $11,250.00 in words and figures as follows:

"C. W. Israel & Co., bankers.

"No. 9950. HENRIETTA, TEX., *Oct. 20th*, 1885.

"Duplicate unpaid.

"Pay to the order of H. B. Schuler, Esq., eleven thousand two hundred and fifty dollars.

"G. A. ARCHIBALD, *Cashier.*

50 "To Laclede Bank, St. Louis, Mo."

The difference in the amount of the Sugg check and the above, of $1,250.00, is amount of commission deducted by Archibald for services, and — forwarded said check by mail to complainant at Winfield, Kansas, who expeditiously forwarded the same through the Citizens' National Bank of Kansas City, and through it to said St. Louis National Bank at St. Louis for collection; that said St. Louis National Bank presented said check for payment to the Laclede Bank at 10.15 a. m. Monday, the 26th day of October, 1885, which was refused, and the check duly protested.

6th. That on the 24th day of October, 1885, said J. N. Israel made an assignment to S. Davidson, who subsequently was succeeded by the respondent Craig, which assignment was made under the laws of the State of Texas in trust for creditors, and which assignment, as well as the laws of the State of Texas respecting assignments, are made part of this agreed statement of facts. Notice of the assignment of said banking institutions of C. W. Israel & Co. was received by telegram by the Laclede Bank before banking hours on Monday morning, October 26th.

7th. That at the opening of banking business on the morning of October 24th C. W. Israel & Co. had to their credit on the books of the Laclede Bank the sum of $12,412.41, and had to their credit under the name and style of the Exchange Bank of Harold the sum of $1,927.33, and to their credit under the name and style of the Exchange Bank of Wichita Falls the sum of $10,013.15; that
51 on said morning of the 24th said Laclede Bank received from C. W. Israel & Co., by mail, for discount and credit, a note of said C. W. Israel & Co. for $6,500, dated the 24th of October, payable in 90 days, which note was sent in renewal of the note of said C. W. Israel & Co. dated 25th of July, 1885, for the same amount, payable in ninety days. Letter enclosing said note is herewith filed and made part of this agreed statement of facts. Upon receiving said note on the 24th of October the Laclede Bank charged up said note of July 25th against the account of said C. W. Israel & Co. with the intention at that time to accept and discount said renewal note, but said discount was not finally made, for the reason that the Laclede Bank received information on said day which led it to believe that C. W. Israel & Co. might be in financial trouble, and final action on said renewal note was withheld. The collateral referred to in said letter of C. W. Israel & Co. was not returned to C. W. Israel & Co. and is still in possession of defendant. Copies of said notes of July 25th

and October 24th are herewith filed and made part of this agreed statement of facts.

8th. All other facts in the bill and answer not inconsistent herewith are to be taken as part of this agreed statement.

DYER, LEE & ELLIS, & N. FRANK,
Solicitors for Complainant.

BOYLE, ADAMS AND McKEIGHAN,
Solicitors for Laclede Bank and J. T. Craig.

And afterwards, to wit, on the second day of April, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

52 *Case Submitted.*

HARRISON B. SCHULER, Complainant,
vs.
LACLEDE BANK *et al.*, Defendants. } 2584.

This cause came on to be heard on the bill of complaint, the answer, and stipulation filed herein, and was argued by counsel and submitted.

And afterwards, to wit, on the 30th day of April, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

Decree.

HARRISON B. SCHULER, Complainant,
vs.
LACLEDE BANK and J. T. GRAIG, Defendants. } 2584.

Ordered, that the following be entered *nunc pro tunct* as of April 12, 1886.

This cause came on for hearing at this term of the court on the bill of complaint, answers of defendants, and stipulations on file, and the court being fully advised concerning the premises finds that at the date of the presentation to the said Laclede Bank of the check set out in the bill of complaint there was to the credit of the account of C. W. Israel & Co. in said bank the sum of five thousand nine hundred and twelve $\frac{41}{100}$ ($5,912.41) dollars, subject to the payment of said check, and that said check operated in equity as an assignment of said sum as against said defendants to said complainant.

It is, therefore, ordered, adjudged, and decreed that the said
53 complainant have and recover of and from said defendants the said sum of five thousand nine hundred and twelve & $\frac{41}{100}$ ($5,912.41) dollars, together with interest at six per cent. per annum from the 26th day of October, 1885, amounting to six thousand and seventy-three $\frac{99}{100}$ ($6,073.99) dollars, and it is further ordered that execution issue therefor against said defendant, The Laclede Bank.

And afterwards, on the 17th day of May, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

Appeal Allowed.

HARRISON B. SCHULER, Complainant,
vs.
LACLEDE BANK, Defendant. } 2584.

Now comes the defendant, by Boyle, Adams & McKeighan, its solicitors, and prays an appeal to the Supreme Court of the United States, which is allowed.

Defendant then presents its supersedeas appeal bond in the sum of fifteen thousand dollars, which is approved and ordered to be filed as part of the record in this cause, citation being waived by complainant.

And complainant prays a cross-appeal, which is also allowed, the defendant waiving the giving of an appeal bond.

And thereupon it is ordered that the clerk of this court make out and certify to the Supreme Court of the United States a transcript of the record and proceedings in this cause.

Said bond is in words and figures following, to wit:

54 Know all men by these presents that we, Laclede Bank of the city of St. Louis, Missouri, as principal, and S. E. Hoffman and John D. Perry, as sureties, are held and firmly bound unto Harrison B. Shuler, of Winfield, Kansas, in the full and just sum of fifteen thousand dollars, to be paid to the said Harrison B. Shuler, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the March term, 1886, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between said H. B. Shuler, as complainant, and said Laclede Bank and J. T. Craig, assignee of J. N. Israel, as fendants, a decree was rendered against the said Laclede Bank and said J. T. Craig, by which the said Shuler recovered of said defendant $6,073, and the said Laclede Bank and said Craig having taken an appeal from the said court to the Supreme Court of the United States in the aforesaid suit, and a citation directed to the said H. B. Shuler, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Laclede Bank and the said Craig shall prosecute said appeal to effect, and answer all damages and costs if — fail to make good their appeal and plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

[Seal of Laclede Bank.]

LACLEDE BANK,
By S. E. HOFFMAN, & [SEAL.]
S. E. HOFFMAN. [SEAL.]
JOHN D. PERRY. [SEAL.]

Attest: W. H. TRASK.

Approved by—

SAMUEL TREAT, *Judge.*

54½ The within-named H. B. Shuler hereby waives a citation in the within appeal.

May 17th, 1886.

DYER, LEE & ELLIS,
Att'ys for H. B. Shuler.

[Endorsed:] No. 2584. United States circuit court, eastern district of Missouri. H. B. Shuler *vs.* Laclede Bank & J. T. Craig. Bond, $15,000. —— ——, principal; —— ——, —— ——, sureties. Filed 17th day of May, 1886. A. P. Selby, clerk.

55 *Opinion.*

In the Circuit Court of the United States for the Eastern District of Missouri, April 12, 1886.

HARRISON B. SCHULER *vs.* LACLEDE BANK *et al.*

BREWER, *J.* (orally):

In the case of Schuler against the Laclede Bank, which was submitted upon bill, answer, and agreed statement of facts, the suit is brought by the plaintiff as the payee of a check drawn by Israel & Co. on the defendant, The Laclede Bank. The check drawn Oct. 20th was presen ed October 26. Israel & Co. failed and made an assignment on October 24, of which notice had been received by the Leclede Bank, who declined paying.

The first question is whether an action at law or a suit in equity can be maintained by the payee of such a check against the drawee under any circumstances, and if so, under what. That no action at law can be maintained in the Federal courts is clear. In the case of the Bank *vs.* Millard, 10th Wallace, 152, the Supreme Court held that "the holder of a bank check cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank, or charged against the drawer." The same doctrine was affirmed in a later case of Bank *vs.* Whitman, 94 United States, 343: "The payee of a check before it is accepted by the drawee cannot maintain an action upon it against the latter, as there is no privity of contract between them."

In the case of Christmas *vs.* Russell, 14th Wallace, page
56 69, in reference to what constitutes an equitable assignment, the court say:

"The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fundholder can safely pay and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described the fundholder is bound from the time of notice. A bill of exchange or check is not an equitable assign-

ment *pro tanto* of the funds of the drawer in the hands of the drawee."

In 2nd Daniel's Negotiable Instruments, section 1638, the author, who criticises this doctrine of the Supreme Court, states that "it is universally understood between banks of deposit, arising from the customs of trade, that the check of the holder is to be paid upon presentation. The United States Supreme Court so declares in a recent opinion, though as yet it has not followed that declaration to its logical sequence," citing Central Bank *vs.* Life Insurance Company, decided in 1881. That logical sequence, as he contends, would be that such a check operates as an equitable assignment and that a suit in equity can be maintained thereon.

These are the chief rulings and expressions of opinion on the part of the Supreme Court in this respect.

I think it is clear from them that no action at law and no suit in equity can be maintained upon the mere possession of such a check; that there must be besides the possession of the check some other circumstances which either create a contract between the payee and the bank, or which equitably require that the funds in the possession of the bank should be appropriated to the payment of the particular check.

57 Over against these decisions of the Supreme Court I find these in this circuit: One in the case of Walker, assignee, *vs.* Siegel, reported in 2nd Central Law Journal, 508, in which my Brother Treat states the rule thus:

"An order drawn on a general or particular fund for a part only does not amount to an assignment of that part or give a lien as against the drawee unless he accepts. That rule as thus broadly stated seems to apply only to cases at law. Such an order, so soon as notice is given to the drawee, works an assignment in equity."

In 1st McCrary, 501, German Savings Institution *vs.* Adae, after the insolvency of and a general assignment by the drawer, the bank came into this court by a bill of interpleader and tendered the money, brought in the payee and the assignee of the drawer, and asked the court to dispose of the fund, and the court, holding possession of the fund as between the drawer of the check and the payee, declared that the payee was entitled to it, and so gave judgment.

In a still later case of 1st Nat'l Bank & others against Coates, assignee, reported in 8th Federal Reporter, 540, the Mastin Bank had drawn on the Metropolitan Bank of New York several checks. On presentation the Metropolitan Bank refused to pay, having previously received notice of an assignment by the Mastin Bank, and turned the money over to the assignee, Coates. These various check holders then brought a suit in equity against the assignee having possession of this money, claiming that as between themselves and the assignee, who represented the drawer, they had an equity upon it superior to the general creditors of the Mastin Bank, and Justice Miller, the presiding justice of this circuit, held that they had, and, in the course of the opinion, he says:

58 "The question here is whether this is an appropriation in equity of that much of that fund in favor of the payee. It is said it is not, because the payee or holder of the check cannot bring suit against the bank for money, and therefore it is not an equitable assignment of that much money. But that argument is founded on a misconception or want of proper conception of the doctrine of equitable assignments. The very words 'equitable assignment' are used because the assignment is only recognized in a court of equity and not a court of law. If it were recognized in a court of law it could be enforced there, and we would never have heard of any such words as 'equitable assignment.' Therefore it is an assignment of that much of the debt, which a court of equity will recognize and a court of law will not."

And further on he says:

"The philosophy of it is that this fund, having been appropriated by these checks duly presented, did not pass by the assignment; that the fund on which they were drawn to that extent did not pass by the assignment, as the general property of the bank, into the hands of Coates, but when he got it he held it subject to the lien established on it. The result of that is that these drafts are each of them an appropriation of that much of the fund, and the complainants are entitled to recover the amount."

That justifies me in the conclusion which I have just expressed that no suit in equity ever can be maintained upon the mere possession and production of the check by the payee; that there must be some equitable circumstances to justify the court in seizing that fund and giving it to the payee. One of those equitable circumstances is the insolvency of the drawer, because, when the
59 drawer becomes insolvent, the question is whether that money shall be paid over to the payee, to whom the drawer has directly appropriated it, or distributed generally amoung his creditors, and it would seem to be equitable that the party in favor of whom the appropriation has been made should be preferred to those creditors who are merely general creditors and in whose favor no such appropriation has been made. That rule applies in this case. So also I think there is some room for the application of the principle that where a fund can be traced equity will follow it. I do not mean to say that there is the fullest room for the application of that principle. The facts are that the cashier of Israel & Co., the drawer of this check, held a note belonging to the plaintiff for collection. He received in part payment thereof a check for $12,500, drawn upon a bank at Forth Worth. He received this as the agent of the plaintiff, the owner of the note. He sent that check to the bank at Fort Worth with directions to deposit the same to the account of Israel & Co., and then, within a day or two, directed $7,000 of that money to be transferred to the Laclede Bank, which was done, and in a roundabout way some more was also transferred to the Laclede Bank, so that practically the money collected on that note went to the Laclede Bank, and made the fund there to the credit of Israel & Co. at the

time this check was presented. I think for both these reasons the payee of the check is entitled to maintain this suit.

A further question then arises upon these facts: Israel & Co., on the morning of October 24, had on deposit in the Laclede Bank twelve thousand and odd dollars. On that day they assigned. Three months before they had discounted with the Laclede Bank a note of $6,500, which, by its terms, would become due on Oc-
60 tober 26. Prior to the 24th they forwarded to the Laclede Bank a new note for $6,500, dated October 24, as a renewal of the former note. The Laclede Bank, on October 24, the day this new note was received, charged up the old note to the account of Israel & Co., but did not discount the new note—at least they did not enter it on the books, and had not formally resolved to discount it; so it stood on the morning of the 26th. On that morning, prior to opening of the bank, they received telegraphic notice of the assignment, and, of course, declined to discount the new note. At a quarter past ten this check was presented. Now, the bank insists that this note was due on the 26th; that, having funds in its possession, it was at liberty to charge up that note as against those funds, and that, therefore, prior to the presentation of this check Israel & Co.'s account was reduced to that extent. On the other hand it is claimed that the note was not payable until the close of the day of October 26, and, therefore, that this check was presented before the note was payable.

This question must be solved in a court of equity upon equitable grounds, and I think that it is equitable for a bank upon the day on which a note becomes due, and at any time during the day, having funds of the maker in its possession, to apply those funds to the payment of that note, although by so doing it leaves nothing standing to the credit of the maker to apply on checks drawn by him. As between the bank, the holder of a note due, and the payee of a check upon that bank the equities are in favor of the bank; or, at least, if the equities are equal, legal title to the funds and possession is with the bank, and it should not be postponed.

This only brings me to another question. J. M. Israel was the sole owner of the bank of C. W. Israel & Co. He was also sole
61 owner of the Exchange Bank of Harold, located in another city, and of the Exchange Bank of Wichita Falls, located in still another place. Each of these three banks owned by J. M. Israel, doing business under a separate name, had a separate account with the Laclede Bank. Does the drawing of this check by the bank of C. W. Israel & Co. operate in any way as an equitable assignment to the payee of the check of any portion of the accounts of these other banks upon the simple grounds that the same man is proprietor of all three? I think not. The equitable assignment created by the drawing of a check does not give rise to anything in the nature of a garnishee upon the bank. Supposing the Laclede Bank, having this account with Israel & Co., had also in its possession a stock of merchandise belonging to Israel & Co. Could it for a moment be claimed that the drawing and presentment of this check would have operated to give a lien upon the stock of goods

or to charge it in any way as a garnishee? It seems to me all that can be claimed in respect to such a check is that it operates as an equitable assignment of the fund on which it is drawn and to the extent only that the fund remains in the possession of the drawee at the time it is presented.

In that view of the case it is unnecessary to inquire as to the state of the account of these other banks or what would be the claim of the assignee as against the Laclede Bank. The account of Israel & Co. was $12,412.41, less the $6,500, the note charged up on the 24th, leaving a balance of $5,912.41, subject to the check at the time it was presented, and for that amount, with legal interest from the date of demand, the plaintiff may take decree.

62 UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2584, of Harrison B. Schuler, plaintiff, against Laclede Bank *et al.*, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this fourth day of August, in the year of our Lord eighteen hundred and eighty-six.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court,
By ——— ———, *Deputy.*

63 [Endorsed:] No. 2584. United States circuit court, eastern district of Missouri. Harrison B. Schuler against Laclede Bank *et al.* Duly certified transcript of the record in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 995. The Laclede Bank and J. T. Craig, assignee of J. N. Israel, appellants, *vs.* Harrison B. Schuler. Filed September 16, 1886. And No. 1017. Harrison B. Schuler, appellant, *vs.* The Laclede Bank and J. T. Craig, assignee of J. N. Israel. Filed September 27, 1886.

120-611

JAN 3 1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1886.

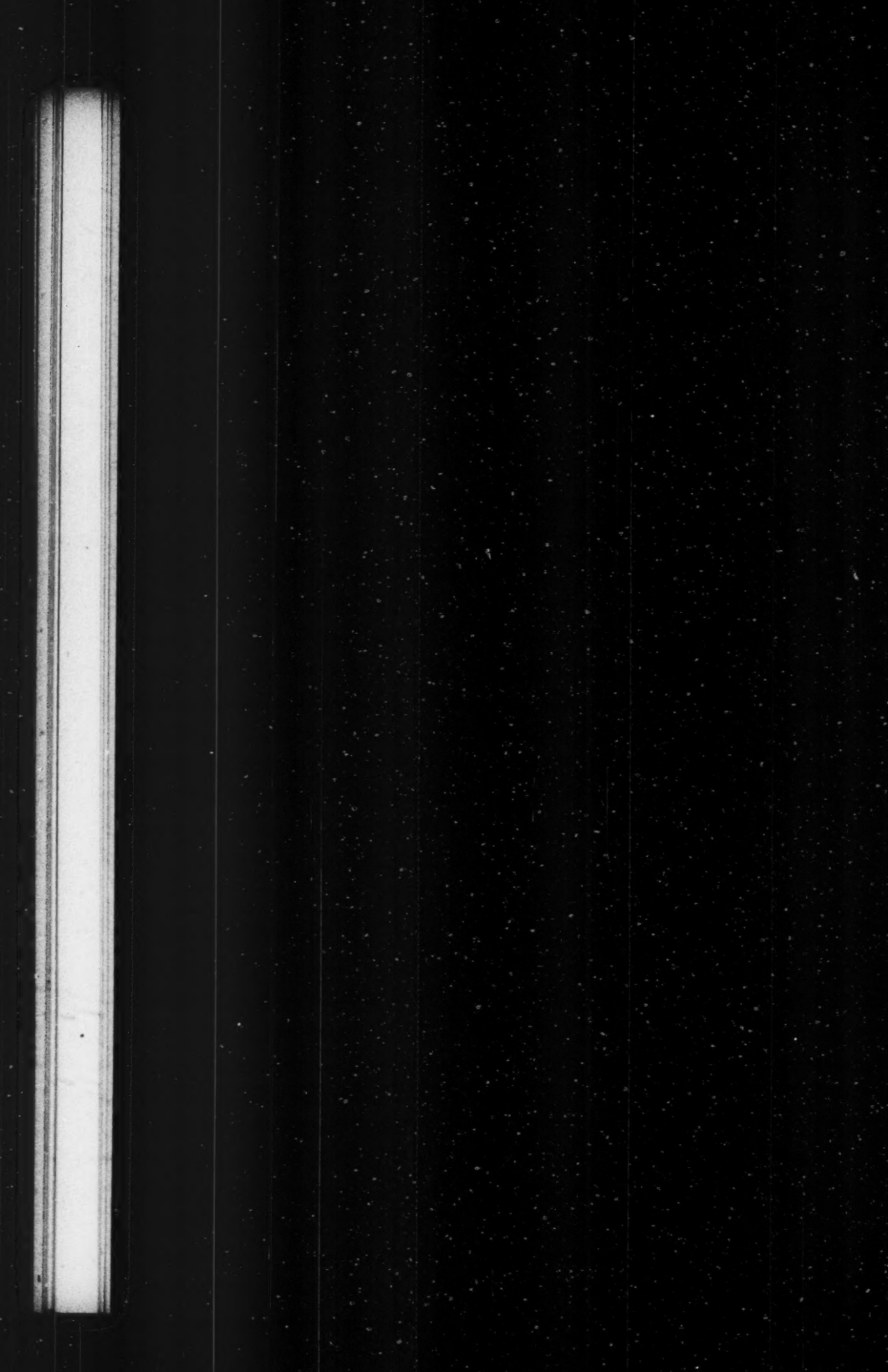
THE LACLEDE BANK AND J. T. CRAIG, ASSIGNEE OF J. N. ISRAEL, *Appellants,*
vs.
HARRISON B. SHULER, *Appellee.* } *No. 995.*

HARRISON B. SHULER, *Appellant,*
vs.
THE LACLEDE BANK AND J. T. CRAIG, ASSIGNEE OF J. N. ISRAEL, *Appellees.* } *No. 1017.*

STATEMENT, POINTS, BRIEF AND ARGUMENT BY SOLICITOR OF H. B. SCHULER.

DAVID P. DYER,
Solicitor for H. B. Shuler.

Nixon-Jones Printing Co., 210 and 212 Pine Street, St. Louis.



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STATEMENT, POINTS, BRIEF AND ARGUMENT BY SOLICITOR OF H. B. SCHULER.

STATEMENT.

J. N. Israel was a banker in the State of Texas, doing business at three different places in that State and under different names to wit, at Henrietta, Texas, under the name of "C. W. Israel & Co. at Harold, Texas, under the name of "Exchange Bank of Harold," and at Wichita Falls, Texas,

under the name of "Exchange Bank of Wichitta Falls." The St. Louis correspondent of J. N. Israel was the Laclede Bank. Three separate accounts were kept with the Laclede Bank by J. N. Israel under the names of "C. W. Israel & Co.," "Exchange Bank of Harold" and "Exchange Bank of Wichita Falls."

Harrison B. Shuler, in October, 1885, held a note of one E. C. Sugg, of Texas, for the sum of twenty-five thousand dollars then due. This note was placed in the hands of one J. A. Archibald (at that time cashier of C. W. Israel & Co.), for collection. Schuler had agreed to pay Archibald twenty-five hundred dollars if the latter succeeded in collecting the whole amount of the note. On the 16th day of October, 1885, Sugg drew his check at Henrietta, Texas, on the State National Bank at Fort Worth, Texas, for the sum of twelve thousand five hundred dollars, payable to the order of C. W. Israel & Co., and delivered the same to Archibald in part payment of the note of twenty-five thousand dollars in favor of Schuler. The credit was duly indorsed on the back of the note. The check was deposited with "C. W. Israel & Co" by the said Archibald for collection, and was forwarded by mail to the State National Bank of Forth Worth for collection, with instructions to notify said "C. W. Israel & Co." when paid. The check reached Fort Worth on the morning of the 17th of October, and was on that day paid by the State National Bank, and the amount duly credited to "C. W. Israel & Co." on the books of said State National Bank. Of all which "C. W. Israel & Co." was promptly notified. "C. W. Israel & Co." had no money to their credit in said State National Bank other than the proceeds of the Sugg check.

On the 19th day of October, 1885, C. W. Israel & Co., by letter directed the State National Bank to remit to the Laclede Bank at St. Louis the sum of seven thousand dollars for the credit of "C. W. Israel & Co.," and to remit five thousand dollars in currency to the "Exchange Bank

of Wichita Falls," for the credit of "C. W. Israel & Co." This disposed of twelve thousand dollars of the amount standing to the credit of "C. W. Israel & Co.," on the books of the State National Bank at Fort Worth.

On the same day, to wit, October 19th, "C. W. Israel & Co.," by letter, directed the "Exchange Bank at Wichita Falls" to remit to the Laclede Bank at St. Louis three thousand five hundred dollars for the credit of "C. W. Israel & Co." Both of these remittances were promptly made to the Laclede Bank, to wit, seven thousand dollars by the State National Bank and three thousand five hundred dollars by the "Exchange Bank of Wichita Falls." These remittances were received by the Laclede Bank on the morning of October 21st, and duly credited to "C. W. Israel & Co."

On the 20th day of October (after notice of the payment of the Sugg check and after the letters of instruction to the State National Bank and the "Exchange Bank of Wichita Falls") C. W. Israel & Co. drew their check No. 9950 on the Laclede Bank St. Louis in favor of Shuler for eleven thousand two hundred and fifty dollars (being the net proceeds of the Sugg check after deducting Archibald's commission) and forwarded the same by mail to Shuler at Winfield, Kansas.

Shuler forwarded this check promptly through the Citizens National Bank of Kansas City to the St. Louis National Bank for collection.

The check was presented to the Laclede Bank at 10.15 a. m. on the 26th of October for payment and payment was refused.

On the evening of Saturday, the 24th day of October, J. N. Israel (the sole owner and proprietor of these three banking concerns in Texas), made an assignment in trust for creditors on that day, to wit, October 24th.

J. N. Israel, had to his credit in the Laclede Bank, the following amounts, to wit:—

" C. W. Israel & Co., . .	$12,412 43
" Exchange Bank of Harold, .	1,927 33
" Exchange Bank of Wichita Falls,	10,013 15
" Total, . .	24,352 89 "

On the morning of this day the Laclede Bank received from " C. W. Israel & Co. " a note for $6.500 (secured by certain collaterals) in renewal of a note for the same amount falling due on the 26th of October.

The Laclede Bank had previously agreed to renew this paper, and the sending of the note was in pursuance of that agreement. Upon receipt of this renewal note on *the 24th*, the Laclede Bank charged up the amount of the note due on *the 26th*, to C. W. Israel & Co., with the intention of crediting C. W. Israel & Co. with the proceeds of the *renewal note*. With the exception of the discount for the renewal note, no change would have been made in the account of " C. W. Israel & Co." with the Laclede Bank. The proceeds of this *renewal* note were not carried to the credit of " C. W. Israel & Co.," on that day, in consequence of certain information the Laclede Bank received, which led it to believe that Israel might be in " financial trouble," and so final action was withheld. On the morning of the 26th of October, the Laclede Bank received the following dispatch :—

" HENRIETTA, TEXAS, 24.

" *Laclede Bank, St. Louis:*

" We assigned this day in favor of S. Davidson. Hold " funds subject to his order.

" C. W. ISRAEL & Co."

At the time the check to Shuler was presented to the Laclede Bank for payment on the morning of the 26th of October it is admitted that there was to the credit of J. N. Israel on the books of the Laclede Bank the following amounts, to wit: —

To the credit of C. W. Israel & Co.'s account .	$5,912 41
" " Exchange Bank of Harold " .	1,927 53
" " " " Wichita Falls .	10,013 15
Total	$ 17,853 09

This, after deducting the note of $6,500 charged to the account of C. W. Israel & Co. on Saturday, the 24th of October. Without this deduction, there was to the credit of J. N. Israel in three accounts the sum of $24,353.09. (See agreed statement of facts, pp. 28, 29 and 30. printed record.)

The Laclede Bank at the time of the presentment of this check for payment held three notes of J. N Israel as follows: —

Note due October 26th, 1885, for.....	$6,500 00
" " November 27th, " "	2,500 00
" " December 12th, " "	8,000 00
Total.....	$17,000 00

None of these notes were due at the time the check of Shuler was presented to the Laclede Bank for payment. Each of the notes were secured by collateral described in the notes themselves. The Laclede Bank had realized on this collateral prior to the making of its answer in this case, the sum of eleven hundred dollars and had in its possession the remainder of such collateral. The Laclede Bank and J. T. Craig, assignee of J. N. Israel, have joined hands to defeat Shuler in collecting the amount paid to J. N. Israel for him by E. C. Sugg, and for which the check had been drawn.

The cause was heard before Judge Brewer on bill, answer and agreed statement of facts. Judgment was rendered by the court in favor of Shuler against the Laclede Bank for the sum of $5,912.41, with interest at 6 per cent per annum from the 26th of October, 1885 — the date of presentment of the check for payment.

From this decree the Laclede Bank and Craig, the assignee, appealed, and a *cross*-appeal was taken by Shuler

ASSIGNMENT OF ERRORS.

1. The Court erred in not giving a judgment for the full amount of the check to wit, $11,250.00 and interest thereon at the rate of six per cent per annum from October 26, 1885.

2. The Court erred in holding that the Laclede Bank had the right to charge up against Israel the unmatured note of $6,500.00.

3. The Court erred in holding that the funds of Israel in the Laclede Bank to the credit of "Exchange Bank of Harold" and to the credit of "Exchange Bank of Wichita Falls," were not subject to the payment of the Shuler check.

POINTS AND AUTHORITIES.

1. The drawing and delivery of the check set out in the bill was an appropriation of so much money of J. N. Israel in the custody of the Laclede Bank as was called for by the check, to wit, $11,250.00.

Chouteau *v.* Rowse, 56 Mo., p. 65;
Union Bank *v.* Oceana Co., 80 Ill., p. 212;
Merchants Bank *v.* State Bk., 16 Wall., p. 647;
Morrison *v.* McCartney, 30 Mo., p. 187.

2. J. N. Israel, prior to his assignment had already surrendered control of the deposit by drawing and delivery of the check, and his assignee took the bank account as well as all other property of the assignor in its exact condition at the time of the assignment, subject to all legal and equitable claims. The assignee claims the fund as a trust fund for distribution among creditors. The Laclede Bank claims a right to certain equitable set-offs. The assignee joins hands with the Laclede Bank in order that he may get the balance of the money and collateral held by it after allowing the banks alleged equitable set-off.

The equitable claim of Shuler is the right to $11,250 of the money of J. N. Israel in the Laclede Bank.

3. The drawing of the check to Shuler operated in equity to transfer so much of the funds of J. N. Israel in the Laclede Bank as would pay the check.

Walker *v.* Siegel, 2d Cent. L. J., p. 108;
German Savings Inst. *v.* Adae, 8 Fed. Rep., p. 106;
First Nat. Bank, et al. *v.* Coates, 8 Fed. Rep., p. 540;

4. As between the assignor and assignee, the claim of the assignee can not rise higher than the right trans-

ferred to him by the assignor. He stands in the shoes of the assignor as to all the property conveyed by the assignment, subject to the legal and equitable rights of all other persons.

Burrill on Assignments, sec. 391;
Rumsey *v.* Town, 20 Fed. Rep. 558;
Stewart *v.* Platt, 101 U. S., p. 738-9.

5. As between Shuler and the Laclede Bank the rights of Shuler are those existing on the morning of the 26th of October, having relation back to the time of drawing of the check by Israel. The right of set-off on the part of the Laclede Bank was defeated by the giving of the check.

Meyer *v.* Davis, 22 N. Y. 489;
Xenia Bank *v.* Stewart, 114 U. S. 224;
McGrade *v.* German Savings Ins., 4 Mo. Appeals 330.

6. The law will make application of the money in the hands of the Laclede Bank according to its own notion of justice.

National Bank *v.* Mechanic's Bank, 94 U. S., p. 439.

7. The assignment of Israel to Craig is void under the laws of Texas.

Muller *v.* Norton, 19 Fed. Rep. 719;
Brown *v.* Knox, 6 Mo. 302;
Keevil *v.* Donaldson, 20 Kansas, 168.

8. The assignment of Israel to Craig, even if valid under the laws of Texas, would not be enforced in Missouri, because in conflict with the laws of Missouri.

Askew *v.* La Cygne, 83 Mo. 366;
Green *v.* Van Buskirk, 5 Wall. 307;
Harvey *v.* R. I. Locomotive works, 93 U. S., p. 671;
Brown *v.* Knox, 6 Mo., p. 302.

ARGUMENT.

The statement of the facts as disclosed by the record in this case is the strongest possible argument in favor of the position assumed by Shuler. A note for $25,000 due Shuler from E. C. Sugg was entrusted to G. A. Archibald, cashier of Israel for collection. He collected $12,500 of Sugg to be credited on the note. This sum was paid by Sugg in a check drawn on the State Bank of Fort Worth, in favor of Israel.

Israel kept an account with the bank at Fort Worth, and at the time he forwarded the Sugg check to it for collection he was overdrawn between three and four hundred dollars. The check was mailed at Henrietta on the 17th of October—received at Fort Worth on the 18th, paid on that day and the amouut placed to the credit of Israel of which he was notified on the 19th. On the day he received the notice he directed by letter the bank at Fort Worth to remit $7,000 of the amount to the Laclede Bank at St. Louis for his credit, and $5,000 in currency to the Exchange Bank at Wichita Falls (another name for J. N. Israel).

On the same day Israel directed the Exchange Bank of Wichita Falls (*i.e.* himself) to remit $3,500 to the Laclede bank at St. Louis for his credit. The remittances were made as directed and the Laclede bank received the same on the morning of the 21st of October and passed the same to the credit of Israel on the account known as that of C. W. Israel & Co.

After these directions had been given on the 19th of October and sufficient time had elapsed for their receipt, to wit, on the 20th of October, Israel drew his check for $11,250 in favor of Shuler on the Laclede Bank and forwarded the same to him at Winfield, Kansas. The money that had been sent to the Laclede Bank to meet this check

~~necessity of citing authorities in support of this position~~. to Shuler, *was Shuler's money* collected by Israel of Sugg, through the bank at Fort Worth. On the 24th of October there was to the credit of Israel in the Laclede Bank under the three names "C. W. Israel & Co.," "Exchange Bank of Harold," and "Exchange Bank of Wichita Falls," the sum of $24,342.89.

The Laclede Bank on that day held three notes of Israel (none of which were due), aggregating $17,000. In pursuance of an arrangement and agreement between Israel and the Laclede Bank, one of the notes, to wit: $6,500, which was to fall due on the 26th of October, was to be renewed, and for that purpose a new note was received by the Laclede Bank on the morning of the 24th. So soon as the renewal note was received, the note falling due on the 26th was charged to the account of "C. W. Israel & Co.," which had the effect of reducing the amount then to the credit of that account, to wit of $12,412.41 to $5,912.41. This balance was reduced by charging up the *unmatured* note, and by the failure to carry the amount of the note in renewal to the credit of the account.

If the Laclede Bank for any reason declined to discount the note sent in renewal, it had no right to charge up the "old note" before it became due. So we insist that there was to the credit of "C. W. Israel & Co." in the Laclede Bank, at the time the check of Shuler was presented for payment, the sum of $12,412.41, instead of $5,912.41.

The Laclede Bank had in its possession at the time this suit was commenced, more than eight thousand dollars in cash to the credit of Israel, after paying every obligation it held of Israel, saying nothing of all the collaterals described in the three notes. It sees proper to make common cause with the assignee as against Shuler. The success of that cause will result in taking the money belonging to Shuler and delivering it to the assignee.

The bare statement of the facts in the case ought to be sufficient in a court of equity to entitle Shuler to a decree in his favor for the full amount of his check without the

necessity of citing authorities in support of this position

It is claimed by the Laclede Bank and Craig that the dispatch of Israel to Laclede Bank dated October 24th, as follows: "We assigned this day in favor of Davidson. *Hold funds subject to his order*," was a revocation of the check given. In the first place we insist that at the time the dispatch was sent Israel intended no revocation, and in the second place he had no such power even if he had so intended.

In the case of First National Bank *v.* Coates, reported in 8th Federal Reporter, p. 540, Justice Miller said: —

"The question here is whether this is an appropriation in "equity of that much of the fund in favor of the payee. "It is said it is not, because the payee or holder of the "check can not bring suit against the bank for money and "therefore it is not an equitable assignment of that much "money. But that argument is founded on a misconcep- "tion, or want of proper conception, of the doctrine of "equitable assignments. The very words 'equitable assign- "ment' are used because the assignment is only recognized "in a court of equity and not a court of law. If it were "recognized in a court of law it could be enforced there "and we never would have heard of any such words as "equitable assignment. Therefore it is an assignment of "that much of the debt which a court of equity will recog- "nize and a court of law will not. * * * * The phi- "losophy of it is that this fund having been appropriated "by these checks duly presented did not pass by the as- "signment; that the fund on which they were drawn to "that extent did not pass by the assignment as the general "property of the bank into the hands of Coates, but when "he got it he held it subject to the lien established on it. "The result of that is that these drafts are each of them "an appropriation of that much of the fund and the com- "plainants are entitled to recover the amount."

The same doctrine was held in

Walker, assignee, *v.* Seigel, 2d Cen. L. J. 508;
German Savings Ins. *v.* Adae, 1st McCreary, 501.

In the case of Walker assignee *v.* Siegel the judge stated the law to be as follows:—

"An order drawn on a general or particular fund for a "part only does not amount to an assigment of that part "or give a lien as against the drawee unless he accepts. "That rule is thus broadly stated seems to apply only to "cases at law. Such an order so soon as notice is given "to the drawee, works in assignment in equity."

It is hard to conceive of stronger "equitable circumstances" than those presented in this case, chief among them being, that the money to the credit of Isaael in the account of "C. W. Israel & Co." with the Laclede Bank was in fact the proceeds of the Sugg check paid by the bank at Fort Worth. It was claimed in the court below that in the different checks drawn and the remittances made to the Laclede Bank of theproceeds of the Sugg check the *identity* of the particular money was lost.

In a recent case, decided by the Supreme Court of Wisconsin (McKeod *v.* Evans, assignee, May 18, 1886) it was held that "the rule in equity is well established that so "long as the trust property can be traced and followed "into other property into which it has been converted, that "it remains subject to the trust. The authorities fully sus- "tain this proposition. We do not understand that it is "necessary to trace the trust fund into some specific prop- "erty in order to enforce the trust. If it can be traced "into the estate of the defaulting agent or trustee this is "sufficient. Beyond all controversy the proceeds of the "draft in Hodges' hands were a trust fund. He having "used them in his business and benefited his estate by "such use as we must assume a trust attaches to that es- "tate which came to the defendant under the assignment."

That was a case where "M. brought a suit in equity to "recover in full from the defendant, who was the assignee "of one Hodges, the proceeds of a draft for $1,500 drawn "on the Ninth National Bank of New York City, which "draft was left with defendant's assignor for collection."

The court sustained the complainant's position and directed the assignee to pay the amount in full.

If the decision of that court is correct then Shuler would have the right to go into court and ask that he be paid in full out of the estate without regard to other creditors of the assignor.

He *is* in court, the assignee is in court and the stakeholder (the Laclede Bank) is in court, and it is submitted that the court having jurisdiction of the parties and the virtual possession of the fund should dispose of the whole case in such a way as to it may seem most equitable.

In the case of German Savings Institution *v.* Adae (8 Fed. Rep. 106) Judge McCrary said: —

"There is certainly no good ground for holding that a "check or a draft drawn upon a fund in bank is not an equi- "table assignment as between the drawer and payee; and "in a case where there is no controversy as to the rights of "the bank or drawee, it does not lie in the mouth of the "drawee or his assignee to say that such an instrument is "not an equitable assignment. If it were conceded that, "as a general rule a check drawn upon a part of a fund in "bank will not, of itself, operate as an assignment *pro* "*tanto*, it is very clear to my mind that this is a case which "a court of equity might well regard as an exception to "any such general rule."

* * * * * * * *

"It is a case to in which it appears that in equity the "fund was the property of Newman & Co. before the "check was executed, being the proceeds of a collection "made for them by Adae & Co. As between the parties "who are now claiming this fund, a court of equity would "have decreed the payment of it to Newman & Co. on the

" ground that Adae & Co. held it for them as the proceeds " of a collection made as their agents, and therefore pro- " ceeds of their properey. (Superintendent etc., *v.* Heath " 2 McCarter (N. J.), 22; Overseers, etc., *v.* Bank of " Va., 2 Gratt. 544). It is well settled that the principal " may follow his property into the hands of his agent or " factor, and recover it *or its proceeds* from him. Veil *v.* " Adm. of Mitchell, 4 Wash. 105; Bank *v.* King, 57 " Pa. 82, 202; Bush *v.* Forsyth, 14 Bush, 499; Cook *v.* " Tallis, 18 Wall. 332. An assignor for general credit- " ors can assert no claim that was not good in the hands " of his assignor. Roberts *v.* Austin, 26 Iowa, 315; " Hagerty *v* Palmer, 6 John. 437; Walker *v.* Miller, 11 " Ala. 1067; Clark *v.* Flint, 22 Pick. 231; Burrill on " Assignments, 483, 484, and authorities cited.

" If there had been no assignment and this were a con- " troversy between Adae & Co and Newman & Co. it would " I apprehend hardly be contended that the right of the " latter to a decree for the money could be questioned. " Such a decree would only give them their own — the pro- " ceeds, of their property to wit certain choses in action left " with their agent Adae & Co. for collection and by them " collected."

In the case of Merchants' Bank & State Bank (10 Wallace, p. 547), Justice Swayne, in delivering the opinion of the court, said :—

" Bank checks are not inland bills of exchange, but have " many of the properties of such commercial paper; and " many rules of the law-merchant are alike applicable to " both. Each is for a specific sum, payable in money. " In both cases there is a drawer, a drawee and payee. " Without acceptance no action can be maintained upon " either against the drawer. The chief points of differ- " ence is that a check is always drawn for a bank or " banker. No days of grace is allowed. The drawer is " not discharged by the laches of the holder in present- " ment for payment, unless he can show that he has sus-

"tained some injury by the default. It is not due until "payment is demanded, and the statute of limitation runs "only from that time."

"*It is by its face the appropriation of so much money "of the drawer in the hands of the drawee to the payment "of an admitted liability of the drawer.*"

To the same effect are Chouteau *v.* Rowse, 56 Mo. 65; Union Bank *v.* Oceana Co., 80 Ill. 212.

Authorities of a like character could be multiplied if it were deemed necessary. To insist that the money in the Laclede Bank to the credit of Israel, it being the proceeds of a collection made by Israel for Shulea, and, therefore, a trust fund, can be taken to pay the general indebtedness of Israel, is so repugnant to all equitable principles, that we confess surprise at it being urged.

In conclusion it is insisted: —

I. That the amount *properly* to the credit of the account of C. W. Israel & Co. at the time of the presentment of the Shuler check was in excess of the amount of the check presented, and on that ground the decree of the Circuit Court should have been in favor of Shuler for $11,250 and interest.

2. The balances to the credit of Israel in the Laclede Bank at the time the check was presented for payment, whether in the account of "C. W. Israel & Co." "Exchange Bank of Harold," or "Exchange Bank of Witchita Falls" were subject in equity, to the payment of the Shuler check.

3. The unmatured notes of Israel to the Laclede Bank (the discount on which the bank had already received) can not be used under a supposed "banker's lien" to defeat the collection of the Shuler check.

4. The Laclede Bank and the assignee of Israel will not be permitted by the shifting of credits from one account of Israel to another, to defeat Shuler in getting his *own* money — money collected by Israel for him from E. C. Sugg.

DAVID P. DYER,
Solicitor for H. B. Shuler.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1886.

LACLEDE BANK AND J. T. CRAIG,
ASSIGNEE OF J. N. ISRAEL,
Appellants.
vs.
HARRISON B. SHULER,
Appellee.
} *No. 995.*

HARRISON B. SCHULER,
Appellant.
vs.
LACLEDE BANK AND J. T. CRAIG,
ASSIGNEE OF J. N. ISRAEL,
Appellees.
} *No. 1017.*

APPEAL AND CROSS-APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND POINTS AND AUTHORITIES.

J. E. McKEIGHAN,
Solicitor for Laclede Bank and J. T. Craig.

Nixon-Jones Printing Co., 210 and 212 Pine Street, St. Louis.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1886.

LACLEDE BANK AND J. T. CRAIG, ASSIGNEE OF J. N. ISRAEL, *Appellants.*

vs.

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HARRISON B. SCHULER, *Appellant.*

vs.

LACLEDE BANK AND J. T. CRAIG, ASSIGNEE OF J. N. ISRAEL, *Appellees.*

No. 1017.

APPEAL AND CROSS-APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

This was a suit in the Circuit Court of the United States for the Eastern District of Missouri, brought by Harrison

B. Shuler, of Winfield, Kansas, against the Laclede Bank of St. Louis, and J. T. Craig, assignee of J. N. Israel, of Henrietta, Texas. The suit was brought by Shuler as payee in and holder of an accepted check for $11,250.00, dated October 20, 1885, drawn upon the Laclede Bank by J. N. Israel through G. A. Archibald, his cashier, at that date doing a banking business under the name and style of C. W. Israel & Co., at Henrietta, Texas. The bill alleged that the funds of said Israel in the hands of said bank should be applied to the payment of said check, and that said Craig claims to be the assignee under the laws of the State of Texas of said Israel.

The bill prayed that a decree be entered adjudging and decreeing that the said bank pay over to the said Shuler a sufficient amount to pay said check.

The bank and Craig filed separate answers.

The answer of the bank set up that on the 24th of October, 1885, before the presentment of the check to the bank for payment (which was on the 26th), the drawer of said check being wholly insolvent, duly made an assignment under the laws of the State of Texas, to one S. Davidson, which was duly recorded on that day; that on the same day the said Israel sent to the bank a telegraphic notice of such assignment, directing it to hold funds in its hand subject to the order of said assignee; said telegram was as follows: —

HENRIETTA, TEXAS, 24.

Laclede Bank, St. L.:

We assigned this day in favor of S. Davidson. Hold funds subject to his order.

C. W. ISRAEL & Co.

The answer set up that said telegram was received by the bank on the 26th of October, 1885, before the Shuler check was presented, and that the telegram so sent and received was a complete revocation of any authority given by said check to pay it and charge it against the account of C. W.

Israel & Co., and for that reason, if no other, the bank properly refused to pay the check.

The answer of the bank also set up that after charging against the account of C. W. Israel & Co. a note discounted for $6,500, dated the 25th of July, 1885, payable ninety days after its date, there remained to the credit of said C. W. Israel & Co.'s account but $5,912.41, which was not enough to pay the check and furnished another valid reason why it refused to pay said check.

The answer also took issue with the averments of the bill that said check was either in law or equity an assignment to Shuler of any part of the funds in its hands to the credit of the account of C. W. Israel & Co., and that not having accepted the check it was not bound either in law or equity to pay it.

The answer of the bank also set up that at the date of said assignment of said Israel it held two unmatured discounted notes of said Israel, one for $8,000 dated September 9th, 1885, due ninety days after its date, and one for $2,500 dated Aug. 24th, 1885, due ninety days after its date; that while certain collateral notes were deposited with said notes as security, their value was not known and only $1,100 had been collected; that the said notes had been discounted on the faith and credit given to said Israel personally, who had been for a long time a depositor in the bank, having large balances to his credit, and not upon any knowledge of or credit given to said collateral; that said Israel was wholly insolvent and said collateral worthless and that in equity said fund should not be taken out of its hands without its said notes being first paid.

The said answer also set up that under the laws of Texas with reference to assignments the defendant bank was entitled to off-set or charge up said unmatured notes in its hands against said funds of Israel. (R. 15).

The answer of the bank also set up that said Israel at and for a long time prior to the dates of said check and assignment had carried on a banking business at three differ-

ent points in Texas, viz.: At Henrietta, Texas, under the name and style of C. W. Israel & Co., at Harold, under the name and style of Exchange Bank of Harold, and at Wichita Falls, under the name and style of Exchange Bank of Wichita Falls, and that when said check was presented for payment there was to the credit of the C. W. Israel & Co., account $5,912.41, to the credit of Harold Exchange Bank account $1,927.33, and to the credit of the Wichita Falls Exchange Bank account $10,013.15; that said accounts were by the course of dealing between said Israel and the Laclede Bank, treated as separate and distinct accounts to the same extent and in the same manner as if belonging to different persons, and Israel always drew his checks accordingly, and they were paid and charged to the accounts against which they were drawn and no other.

Said answer also set up that Davidson, named as assignee in the said Israel deed of assignment, declined to qualify as such, and that thereupon under the laws of Texas the county judge of the county appointed the defendant J. T. Craig as such assignee, on the 2nd of November, 1885, duly qualified, gave bond, and took possession of the assigned assets of Israel.

The answer of Craig set up so far as necessary the same state of facts as the answer of the bank, claimed that the check was not an assignment either in law or equity of the funds in the hands of the bank — never having been accepted — that the Israel telegram to the bank was a revocation of all checks, including the Shuler check, and that the deed of assignment to Davidson followed by his refusal to qualify, and the subsequent appointment of the defendant and his qualification, vested in him the title to said funds of Israel in the hands of the bank subject to the claims of the bank set up in its answer.

The case was submitted to the Court on bill, answers and stipulation. (Record, 28 to 30 inclusive.)

It will be observed that the stipulation does not change any of the denials of the averments of the bill, or any of the

allegations of the defendant's answers. The only office that the stipulation performs, is to furnish the details of the facts which led to the giving of the Shuler check and the charging up against the C. W. Israel & Co. account the note of $6,500 dated July 25, 1885, and falling due October 26th, 1885. The answers of the defendants are in nowise affected by the stipulation.

The laws of Texas on the subject of assighments are to be found on pages five to eight inclusive of appendix to Revised Statutes of Texas, 1879, and pages 46 to 48 inclusive of Session Laws of Texas, 1883.

The sections of said laws in Revised Statutes to which we call attention of the Court to are as follows: —

SECTION 1. Be it enacted by the Legislature of the State of Texas, That every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate other than that which is by law exempt from execution among all his creditors in proportion to their respective claims, and however made or expressed shall have the effect aforesaid and shall be construed to pass all such estate whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as is provided by law in conveyances of real estate or other property.

SEC. 2. The debtor shall annex to such assignment an inventory containing the following statement: —

1. A full and true account of all the creditors of such debtor or debtors.

2. The place of residence of each creditor, if known to such debtor or debtors, and if not known that fact to be so stated.

3. The sum owing to each creditor and the nature of each debt or demand, whether arising on written security account or otherwise executed.

4. The true cause and consideration of such indebtedness in each case and the place where such indebtedness arose.

5. A statement of any existing judgment, mortgage, collateral or other security for the payment of any such debt.

6. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law or equity, and the encum-

brances existing thereon, and of all vouchers and securities relating thereto, and the value of such estate according to the best knowledge of such debtor or debtors.

7. An affidavit shall be made by such debtor or debtors, and annexed to and delivered with such inventory or schedule, that the same is in all respects just and true according to the best of such debtor or debtors' knowledge and belief. Nothing contained in this act shall affect the assignor's right to retain all such of his property as is by the constitution and laws of this State exempt from execution, but such list and inventory shall not be conclusive except as against the debtor making the same.

SEC. 7 Every creditor, consenting to an assignment, shall within six months from the time of the first publication of the notice of appointment of the assignee, file with such assignee a distinct statement of the particular nature and amount of his claim against the debtor, which shall be supported by an affidavit of the creditor, his agent or attorney, that the statement is true, that the debt is just and that there or no credits or offsets that should be allowed against the claim, except as shown by the statement, and no creditor shall take any benefit under any assignment whatever who neglects to file such statement.

SEC. 9. All property conveyed or transferred by the assignor previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors may in his name, upon securing such assignee against cost or liability, sue for, recover, collect and cause the same to be applied for the benefit of creditors as any other property belonging to the debtor's estate in the hands of the assignee; but if it shall appear in such action that the purchaser of any such property bought the same of the assignor in good faith and for a valuable consideration and without any reason to believe that the debtor was conveying or transferring the same with the intent or design aforesaid, such purchaser shall be held to have acquired as against the assignee and creditors aforesaid, a good and valid title to such property.

SEC. 13. Claims that are not due may be allowed at their present value by discounting them at the rate of interest mentioned in the contract, if any, otherwise at the legal rate, and if any creditor holds collateral security of less value than his debt, the value thereof may be estimated by the assignee, and only the difference between such sum and the debt shall be allowed.

SEC. 18. Any attempted preference of one creditor or creditors of such assignor shall be deemed fraudulent and without effect.

The Court's attention is called to certain sections of Session Laws of 1883: —

SECTION 1. Be it enacted by the Legislature of the State of Texas, That Section three (3) of an act of the Legislature of the State of Texas, entitled "An Act in relation to assessments for the benefit of creditors and to regulate the same and the proceedings thereunder," approved March 24th A. D. 1879, be and the same is hereby amended so that it shall hereafter read as follows, to-wit: —

SEC. 3. Any debtor desiring so to do, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto, and such debtor shall thereupon be and stand discharged from all further liabilities to such consenting creditors on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debtor a release therefrom; provided, that such debtor shall not be discharged from liabilities to a creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor."

SEC. 2. That section six (6) of said act be and the same is hereby amended so that it shall hereafter read as follows, to-wit: —

SECTION 6. Every such assignee shall be a resident of this State and of the county in which the assignor resides, or in which his principal business was conducted, and he shall forthwith after the execution and delivery of the deed of assignment, cause the same to be recorded as herein provided, in the county of such assignee's residence, and also in every county in which there is any real property conveyed to him by such deed of assignment, and shall execute a bond, with sureties, to be approved by the judge of the county court of the county in which the assignee resides, or by the judge of the district court of the judicial district in which such county is situated, conditioned that he will faithfully discharge his duties as such assignee, and that he will make proportional distribution of the net proceeds of the assigned estate among the creditors entitled thereto, which bond shall be payable to the State of Texas, and shall be filed with the county clerk of the county in which such assignee resides, and shall inure to the benefit of the assignor, and the creditor, or creditors, who may maintain an action thereon against such assignee and sureties, in his or their own name, jointly or severally, for any breach thereof, or violation of this law, by reason of which such assignor or creditor shall sustain damage, and upon the filing of said bond the assignee shall take possession of the assigned property, and proceed to execute the assignment, and if such assignee shall not, within five days

after the delivery of the deed of assignment, execute an approved bond and file the same with the county clerk, as herein provided, such assignment shall, nevertheless, take effect as against the assignor and his creditors, and it shall be the duty of the county judge, or judge of the district court, as aforesaid, upon the application of the assignor, or any creditor, and being satisfied that such bond has not been given, approved and filed, to appoint in writing another competent assignee, who shall, upon the execution of such bond, approved and filed as herein provided, take possession of the assigned property, and proceed to execute the assignment. And it is further enacted, that no fraudulent act, intent or purpose of the assignor or assignee shall have the effect to defeat the assignment or to deprive the creditor's consenting thereto from the benefits thereof, but any such fraudulent act, intent or purpose on the part of the assignee shall be sufficient cause for his removal, as being an unsuitable person to perform the trust, and any consenting creditor may be or become a party to prosecute or defend in any suit or proceeding necessary or proper for the enforcement of his rights under such assignments, or for the protection of his interests in the assigned property.

The Circuit Court in an opinion (Record, 32 to 36 inclusive) held that the check in question operated in equity as an assignment of the funds in the hands of the bank to the credit of the C. W. Israel & Co. account, but to that fund alone, and not to the fund standing to the credit of the Exchange Bank of Harold and Exchange Bank of Wichita Falls accounts.

The court thereupon entered a decree (Record, 30) adjudging that the appellee (Shuler) recover from said bank the sum of $5,912.41, with interest at six per cent from the 26th day of October, 1885. From this decree the bank and Craig, the assignee, have appealed, and a cross-appeal has also been taken by Shuler as to the amount of his recovery.

ASSIGNMENT OF ERRORS.

1st. The court erred in holding that said check operated as an assignment of the fund to the credit of the C. W. Israel & Co. account.

2d. The court erred in not holding that the bank had a claim to said fund, equal, if not superior, to Shuler, by reason of the two unmatured notes of said Israel.

3d. The court erred in not holding that the telegram of Israel and Co., of October 24th, 1885, and received by the bank before the presentation of the check, was a full revocation of the same, and utterly destroyed it as the basis of any demand against the bank or the fund in its hands.

4th. The court erred in holding that an action in equity could be maintained on said unaccepted check against the bank.

5th. The court erred in not holding that under the laws of Texas the funds in the hands of the bank were proper subject of set off against the said unmatured notes of Israel.

6th The decree should have been for a dismissal of the bill.

POINTS AND AUTHORITIES.

1st. As between the banking house of C. W. Israel & Co. the relation between the two banks was that of a debtor and creditor.

Planters' Bank *v.* Union Bank, 16 Wall. 483.

And this was so even if it were conceded that indirectly or directly the whole of the credits to the partnership accounts of C. W. Israel & Co. arose from the collection made by the latter bank for Shuler.

Phœnix Bank *v.* Bisby, 111 U. S. Rep. 125;
Marine Bank *v.* Fulton Bank, 2 Wall. 252;
Jackush *v.* Tousey, 51 Texas 129.

And under such circumstances no fiduciary relation exists.

Cronan *v.* Coting, 104 Mass. 245.

2d. The drawing of the Shuler check did not operate to transfer to Shuler any portion of the debt of the Laclede Bank to Israel, or to give him any lien thereon. There was no privity between Shuler and the drawee bank. A single cause of action cannot be split up without the assent of the debtor.

Manderville *v.* Welch, 5 Wheaton 277;
Bank *v.* Millard, 10 Wall. 152;
Dickinson *v.* Coates, 79 Mo. 250;
Rosenthall *v.* Metropolitan Bank, assignee of Mastin Bank, 17 Blatchford, 318.

3d. There is no assignment either at law *or in equity* where there is any power or revocation in the assignor, or where the holder of the fund *cannot be compelled to pay although forbidden by the assignor*. An order or check is not an equitable assignment unless it is to pay out of a specified fund, specified in the order.

Christmas *v.* Russell, 14 Wall. 69.

4th. A check is simply the written order of the depositor on his bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the bank has paid it or committed itself to paying it.

Morse on Banking (and many cases cited), 302–305.

The death of a drawer of a check operates as a revocation of the authority of the bank upon which it is drawn to pay it.

Morse on Banking, 260 (cases cited);
Tate *v.* Hulburt, 2 Ves. Jr. 118.

It is an excuse for the holder of a check to present it for payment, that the drawer of the check has directed the bank not to pay it.

Daniel on Neg. Inst., 2d vol., p. 608.

5th. The amount to the credit of the account of C. W. Israel & Co. when the check was presented was less than the amount of the check, and the bank had no authority to pay less than the whole check; it could not pay a part and refuse to pay more.

Gilson *v.* Cooke, 20 Pick., p. 15;
Morse on Banking, 274 (cases cited).

6th. Shuler, in any view of the case, should have been postponed to the two unmatured notes of the bank. By the laws of Texas the two notes were provable against the assigned estate, and hence were subject of set off against the amount to the credit of C. W. Israel & Co. which came into the possession of the bank in the regular course of business and without any notice of the source from which it came, if, indeed, that would have made any difference.

This was the law with respect to cases arising under the bankrupt law. In bankruptcy all debts are to be "liquidated as of one and the same day. The money (in the bank) or credit belongs to the assignees for the use of the general creditors, but the law says he shall not recover it in full and turn the particular creditor over to a dividend."

1 Wash C. C. 178;
16 National Bankruptcy Register, 420, Ex parte Howard National Bank, In re North & Co.;
14 National Bank Reg. 148, In re Farnsworth;
3 Nat. Bank Reg. 134, Catlin *v.* Foster, Brown & Co.

It was so under the English bankrupt law.

Ex parte Prescott, 1 Ark. 230;
Dobson *v.* Carne, 5 T. R. 130;
Ex parte Wagstaff, 13 Ves. 65;
Atkinson *v.* Elliot, 9 T. R. 378.

The doctrine is the same in Massachusetts under the insolvent laws of that State.

Albrick *v.* Campbell, 4 Gray, 284;
Denman *v.* Bank, 5 Cush. 194.

The same doctrine is applied to general assignment laws.

McClagg *v.* Woodman, 28 Ill. 84;
Burrill on Assignments, 610;
Morse on Banking, 45–46.

8th. In equity, irrespective of any statutory provisions, the insolvency of the maker of an unmatured note, gives the right of set off.

Ford Ad. *v.* Thornton, 3 Leigh, p. 695;
Stepens ex parte, 11 Vesey, p. 24;
Green *v.* Mansfield, 4 Barr, 214.

9th. The assignment of October 24th, 1885, passed the funds or credits of J. N. Israel in the Laclede Bank to the assignee, and through him by subsequent appointment, to Craig.

Burrill on Assignments, sec. 102.

An assignment, good under the law of the State where made, is valid in every other State unless repugnant to the law of such other State, and even then it is good as to everybody, except as to the *resident creditor* of the other State where sought to be enforced.

Bryan *v.* Brisbin, 26 Mo. 425;
Thurston *v.* Rosenfield, 42 Mo. 480;
Eisner *v.* Beste et al., 32 Mo. 240;
Chaffee *v.* 4th National Bank, 71 Me.;
Burrill on Assignments.

It is doubtful whether the United States Courts would

make the exception above noted in favor of the resident creditor in the State where the law differed from the State where the assignment was made.

Caskie *v.* Webster, 2 Wall jr. 131 (U. S. Circuit Court);
Dundas *v.* Bowler, 3 McLean 97;
Fuller *v.* Sleighty, 27 Ohio St. 355.

ARGUMENT.

I.

The facts of this case are not in dispute and more briefly given than in statement, as shown by the answer of the bank (pp. 5, 6 and 7 of the Record and pp. 28 and 29 of Record) are as follows: Shuler, living at Winfield, Kansas, had a note for $25,000 against one E. C. Sugg, who it would seem lived at or near Henrietta, Texas. Shuler entrusted said note for collection to one G. A. Archibald, who it would seem was cashier of the banking house of C. W. Israel & Co. at that place. On the 16th of October Sugg gave to Archibald his check on the State National Bank of Fort Worth, Texas, for $12,500, payable to the order of C. W. Israel & Co., the proceeds of which were to be applied as part payment on said note when paid by the Fort Worth Bank. Archibald deposited the Sugg check (Record, 28) with C. W. Israel & Co. C. W. Israel & Co. was the correspondent of the Fort Worth Bank and kept an account with it, which was at the time overdrawn about $340. (Record, 5). C. W. Israel & Co. forwarded the Sugg check to the Fort Worth Bank (the drawee bank in Sugg check) with instructions to notify C. W. Israel & Co. when paid. The Fort Worth Bank received the Sugg check on the 17th of October, and honored, or paid it, by placing the proceeds, as in ordinary course, to the credit of C. W. Israel & Co.'s account on its books.

On the 19th of October C. W. Isreal & Co. directed the Fort Worth bank to remit to the Laclede Bank (one of the

appellants herein) the sum of seven thousand dollars and five thousand dollars in currency to the Exchange Bank at Wichita Falls (one of Israel's banks), and also by letter directed the bank at Wichita Falls to remit $3,500 to the Laclede Bank, at St. Louis, to be placed to the credit of the C. W. Israel account. Both of said sums were received by the Laclede Bank October 21st and credited to C. W. Israel & Co. account. On the 20th of October C. W. Israel & Co. drew the check sued on in favor of Shuler for $11,250, and sent it to him by mail at Winfield, Kansas. Shuler received the check, sent it to the Citizens' National Bank at Kansas City, who sent it to the St. Louis National Bank, who presented it for payment at 10:15 a. m., of the 26th of October.

On the 24th of October Israel made an assignment of all his property to one Davidson. (Record, 29; deed found p. 23 to 26.) Davidson failed to qualify, whereupon Craig was appointed and qualified.

On the morning of the 24th of October there was to the credit of the C. W. Israel & Co. account $12,412.41; to the Harold Exchange Bank account $1,927.33, and Exchange Bank of Wichita Falls account $10,013.15.

On the 24th of October the Laclede Bank held a discounted note for $6,500 falling due October 26th, which it had been requested theretofore by C. W. Israel & Co. to renew by taking another note for same amount payable in ninety days from its date. On the morning of the 24th it received this renewal note for $6,500, which was dated the 24th of October instead of the 26th. Upon receiving it the bank charged up against the C. W. Israel & Co. account the $4,500 note dated July 25th, with the purpose to discount the said renewal note (Record, 29), but which was not done because of rumors that day affecting the financial standing of Israel.

When the Shuler check, therefore, was presented there was to the credit of the C. W. Israel & Co. account but

$5,912.41. On said 24th of October, Israel sent a telegram to the Laclede Bank as follows: —

HENRIETTA, Texas, 24,

Laclede Bank, St. L.:

We assigned this day in favor of S. Davidson. *Hold funds subject to his order.*

C. W. ISRAEL & Co.

This telegram reached St. Louis Sunday morning, Oct. 25th, but was not received by the bank until about eight o'clock of the morning of the 26th, two hours and fifteen minutes before presentation of Shuler check.

On the 24th of October, the date of the assignment, the Laclede Bank held two unmattured discounted notes of Israel, executed in the name and style of C. W. Israel & Co., one for $2,500 and the other for $8,000. (R. pp. 12 to 14 inclusive.) The collateral was worthless except to the extent of $1,100 collected, but the notes had been discounted on the credit of Israel alone, who had been for a long time a customer and correspondent of the bank, and a banker himself who had always paid his notes, and who at the date of the discount of said notes had considerable balances to the credit of his three several accounts. (Record, pp. 14 and 15.)

The three several accounts were kept by Israel and the Laclede Bank wholly separate and distinct as much as if they had belonged to different persons.

Upon this state of facts there can be no doubt, but under the decisions of this Court in 2nd Wall. 252 and 111 U. S. Rep. 125, *supra*, the relation of Israel and the Laclede Bank as to the amounts to his credit in his several accounts was that of debtor and creditor. Indeed the same might be said upon the law of these cases with respect to the proceeds of the Sugg check in the hands of the Fort Worth bank; but if there had been any trust character in the fund at Fort Worth, it was lost by the Laclede Bank receiving

it in the ordinary course of business without notice of any trust imposed on the same. The case then is simply that of a check in usual form drawn generally by a creditor bank on a debtor bank, and the question is, first, whether either in law or equity the holder of such a check can maintain an action thereon against the debtor and drawee bank. At law it is conceded that under the decisions of this Court in Manderville *v.* Welch, 5th Wheaton, and 10th Wallace, Bank *v.* Millard, *supra*, that the holder of such a check cannot maintain an action unless the drawee bank has accepted it, or in some other way expressly committed itself to paying the particular check. Can an action be maintained on such a check in equity? We claim that it cannot no more than at law.

The opinion and decree in this case puts the right to maintain the action in equity on the ground that the check amounted to an equitable assignment to Shuler of so much of the fund or credits of Israel in the hands of the bank, and that insolvency of the drawer intervening, a court of equity has jurisdiction to enforce its payment out of the fund or credits. It is plain that if the action can be maintained at all it must be on the grounds assigned by the lower court. Stated in another way, the doctrine of the lower court is this: The check in the first place of its own force operates as an assignment in equity *pro tanto*, and if the insolvency of the assignor intervenes, equitable relief will be granted because the legal remedy on the check against the drawer would be inadequate. Of course it will not be contended that the mere insolvency of the drawer of the check, existing at the date of the check, or occurring subsequently, would add any new quality or character to the act of drawing the check. Whether solvent or insolvent the act is the same, the consideration is the same, and the effect is the same. The check in the first instance is either an equitable assignment or it is not, without regard to whether the drawer is insolvent or not. If it operates as an equitable assignment, there can be no reason why the payee or holder

of the check drawn by a solvent person cannot maintain an action in equity, for if it is an assignment in equity as distinguished from law, then a court of equity should have jurisdiction to enforce it just as much when the drawer is solvent as when insolvent.

In contracts an assignment is defined to be a transfer or making over to another of the whole or some part of any property, real or personal, in possession or in action, or any estate or a right therein.

Bouvier Law Dictionary, Vol. 1, p. 155.

But there must be a *transfer* of the title or right of the assignor to the assignee in the very thing intended to be transferred, or there is no assignment any more in equity than at law. If the act done is a mere direction or authority given to some one holding the thing about which the authority or direction is given, or owing the debt or obligation with reference to which the direction or authority is given, then there is no assignment, and if the person to whom the direction or authority is given refuses to assent or to obey the direction, the remedy against such party for the breach of his obligation is in the party giving the direction and not in the person in whose favor or for whose benefit it was given. A check is neither in form or spirit a transfer of anything either in whole or in part. It is a mere direction or authority of the depositor on his bank to pay to a person named a specified sum of money It is true that the bank is under general obligation to the depositor to obey the direction and pay to the person named, but this obligation or any part of it is not *transferred or assigned* to the payee of the check. There is never any privity created between the bank and the payee. This court covered the whole ground in Bank *v.* Millard in the following language: "On principle there can be no "foundation for an action on the part of the holder unless "there is a privity between the bank and the holder. How

"can there be such a privity when the bank owes no duty "and is under no obligation to the holder. The holder "takes the check on the credit of the drawer in the belief "that he has funds to meet it, but in no sense can the "bank be said to be connected with the transaction. If it "were true that there was a privity of contract between the "bank and holder when the check was given, the bank "would be obliged to pay the check, although the drawer "before it was presented, had countermanded it, and al- "though other checks drawn after it was issued, but be- "fore the payment of it was demanded, had exhausted the "funds of the depositor. If such a result should follow "the giving of checks, it is easy to see that bankers would "be compelled to abandon altogether the business of keep- "ing deposit accounts for their customers. If then the "bank did not contract with the holder of the check to pay "it at the time it was given, how can it be said that it owes "any duty to the holder until the check is presented and "accepted? The right of the depositor as was said by an "eminent judge is a chose in action, *and his check does not "transfer the debt, or give a lien upon it to a third person "without the assent of the depository.* This is a well es- "tablished principle of law, and is sustained by the English "and American decisions."

If, then, the check does not *transfer* the debt, or give a *lien* upon it, how can the bank be compelled to pay it any more in equity than at law. There being no transfer and no lien, there is nothing to enforce against the bank; yet in this case the decree proposes to enforce the check as a transfer and to compel its payment by an execution against the bank. True, the action in 10th Wallace was at law, but the principles laid down were general as to the *effect* of a check, which effect is the same in equity as at law. Courts of equity do not create rights, which have no existence, although they furnish remedies different from law, and circumstances like insolvency often set in motion, or even confers, the equitable remedy, but the right must first exist;

if, therefore, as the court says, "a check does not *transfer* any portion of the debt or give any *lien* thereon" to the holder of the check it is plain enough, we think, that there is no right legal or equitable for the court of equity to enforce.

In Christmas *v.* Russell, 14th Wallace, 69 (p. 84) this court, in an equity case, where the bill sought to have the court decree that under a peculiar state of facts there had been an assignment of certain notes, laid down certain general principles which applied to this, are fatal to the decree. The court says: "An agreement to pay out of "a particular fund, however, is not an equitable assign- "ment; a covenant in the most solemn form has no "greater effect. The phraseology employed is not material, "provided the intent to transfer is manifested. Such an "intent and its execution is indispensable. The assignor "must not retain any control over the fund, any author- "ity to collect, or any power of revocation. If he do "it is fatal to the claim of the assignee. The transfer "must be of such a character that the fundholder can "safely pay, and is *compellable* to do so, although for- "bidden by the assignor. Where the transfer is of the "character described, the fundholder is bound from the "time of notice. A bill of exchange *or check* is not an "equitable assignment *pro tanto* of the funds of the "drawer in the hands of the drawee. But an order to "pay out of a *specified* fund has always been held to be "a valid assignment in equity, and to fulfill all the re- "quirements of the law."

Tested by the rules here laid down the check in question did not operate as a transfer either at law or equity of any part of the deposit debt owed by the Laclede Bank to C. W. Israel & Co. It was not drawn on a *specified* fund, but generally in the usual course of banking. There is nothing to show an intent to *transfer* any particular part of any fund or debt, or to do anything else or more than is done in the drawing of any check by one banker on another

banker, his correspondent. C. W. Israel & Co. still, despite the check, retained control of the debt or fund. The check was revocable. The bank was not compellable to pay to the holder whether forbidden or not by C. W. Israel & Co. The check had no single one of the qualities, all of which are held by this court necessary to constitute an assignment or a transfer, and while that portion of the opinion which says, that "a bill of exchange or check is not an equitable assignment" may be claimed to be *obiter dicta*, since the suit in that case was not, as here, upon a bill of exchange or a check, yet it was good as an apt illustration, and as citing by way of example a case where there could be no doubt, and which must be so if the rules laid down are correct.

Reference will be made by counsel to the language of this court in Merchants Bank *v.* State Bank, 10 Wallace, p. 647, where it is said: "It (a check) is by its face the appropriation of "so much money of the drawer in the "hands of the drawee to the payment of an admitted lia- "bility of the drawer."

The language must be considered with reference to the facts in that case. It was an action of one bank against another upon checks certified as good. This court held properly that to certify that a check is good is equivalent to an acceptance. "It implies [says the court] that the "check is drawn upon sufficient funds in the hands of the "the drawee, *that they have been set apart for its satisfac-* "*tion*, and that they shall be so applied when the check is "presented for payment." Under such circumstances the checks in the suits were appropriations. But before a check is accepted either in terms or by an equivalent act, it is a mere direction to appropriate, which requires the executing act of the draweee bank to effect the appropriation. There is no conflict between the cases last cited and the earlier case of Bank *v.* Millard in the same report, and the case of Christmas *v.* Russell in the 14th of Wallace.

The court below refers, in support of the conclusion it came to, three cases, viz.: Walker. assignee, *v.* Siegel, 2d Contral Law Journal, 508; German Savings Institution *v.* Adae, 1st McCrary, 591; and First National Bank et al. *v.* Coates, assignee of Mastin Bank. Judge Treat, in the first of the cases cited above, held that a check "so soon as "notice is given to the drawee works an assignment in equity." This is clearly repugnant to the principles laid down in Christmas *v.* Russell, and to the express declarations of this court in Bank *v.* Millard, *supra*. It is difficult to see what new quality can be given to a check by notice to the drawee. If a check amounts ever to an assignment so as betweeen the drawer and payee to transfer title from one to the other, it accomplished that result when it was drawn. The notice as in other cases of an assignment of a chose in action takes the place of delivery of a tangible movable chattel, and would protect the holder of the check against other checks or assignments (if a check is an assignment) presented subsequently. So that if the bank paid on the other checks subsequent to notice it would st ill be compelled to pay to the holder of the check first giving notice (if a check is an assignment). The notice is to bind the fundholder as this court says in Christmas *v.* Russell. But this court says the bank cannot be compelled to pay it, may refuse arbitrarily to pay to the holder of a check first giving notice and pay to a subsequent checkholder, or it may refuse to pay because the drawer has with or without reason revoked the authority or direction given in the check. This could not be so, if the drawing of a check with notice operated as an assignment either at law or in equity.

The case in 1st McCrary was where the bank brought the money due the depositor into court, by interpleader making drawer and drawee parties. In such a case the claim of the payee in the check or the holder of it would be more attractive and plausible, than legal and valid. But such a case does not apply here because the bank has not brought the

money into court. On the contrary it holds on to it, refuses to pay and insists that it may righfully refuse.

The case of First National Bank *v.* Coates is not fully in point, because there the suit was not against the drawee bank on the check, but against the assignee of the drawer bank after the drawee bank had paid the deposit to the assignee, which made it much the same as the case in 1st. McCrary, that is, the drawee had disclaimed any right or interest in the sum due and divested itself of possession by in one case paying it into court, and in the other paying it to the assignee.

The case last cited grew out of the following facts: The Mastin Bank, in 1878, was carrying on a general banking business in Kansas City, Missouri. It had as its correspondents and deposited with the Metropolitan Bank of New York, and the Merchants National Bank of St. Louis. It made a general assignment to Kersey Coates for the benefit of all its creditors August 3d, 1878, having outstanding various checks drawn in ordinary course, on both the said banks. Out of that assignment grew four published cases as to the rights of the outstanding check holders to the deposit debts or money owed by these two banks to the Mastin Bank, viz.: —

Dickinson *v.* Coates, 79 Mo., p. 25, and
Merchants National Bank *v.* Coates et al., same report 168;
Rosenthal *v.* Metropolitan Bank, and
Kersey Coates, assignee of Mastin Bank et al., 17 Blatchford 318; and the cases in the 8th Federal Reporter, 540, referred to.

One of the cases in the 79 Mo., Merchants National Bank *v.* Coates et al., was where the Merchants National Bank of St. Louis, correspondent of Mastin Bank, assignor of Coates, by bill of interpleader brought the money owed by it on deposit account into court, and made all the check

holders on it and Coates, the assignee, parties. The Circuit Court of St. Louis, took the fund and ordered the defendants in the bill of interpleader to set up their respective claims. On final hearing the Circuit Court gave the fund according to priority of presentment and demand to the checkholders, as against the assignee. An appeal was taken to the Supreme Court, where the decree was reversed, that court holding in conformity with its decision in the case of Dickinson *v.* Coates in the same volume, and following the law of this court, that a bank check drawn for a part only of the drawer's deposit does not operate, either in law or equity, as an assignment of the deposit *pro tanto* or confer any lien upon it.

The case of Dickinson *v.* Coates was where the Mastin Bank had given its check to Dickinson on August 2nd 1878, for $500 on its correspondent in New York, the Metropolitan Bank. The assignment to Coates was on the 3rd and notice of assignment (no formal revocation as in this case) given same day to Metropolitan Bank. On August 5th the check was presented for payment to the latter Bank and payment refused. The Metropolitan Bank paid over the amount owing by it to the Mastin Bank on its deposit account, to Coates, the assignee. Dickinson filed his bill against him for a decree against him that he pay over to him the amount of the check. The lower court entered such a decree and the Supreme Court reversed it, on the ground stated in Merchants Bank *v.* Coates, quoting largely from Bank *v.* Millard and Christmas *v.* Russell, *supra*. The question is put by the Missouri court (Dickinson *v.* Coates, p. 251) in the following forcible manner: "Did the check in question, it being neither drawn "on any particular funds, nor for the whole sum due the "drawer from the drawee, nor containing any words of "transfer operate before its presentment and acceptance "by the drawee as an assignment either in law or equity "of so much of the deposit standing to the credit of the "drawer in the New York bank as the check called for.

"An affirmative answer to this question affirms, and "a negative one reverses the judgment." That court then proceeds to hold that a check does not operate either in law or equity as an assignment.

The case of Rosenthal *v.* Metropolitan Bank and Kersey Coates, 17 Blatchford, was an effort by a holder of one of the Mastin bank checks on the Metropolitan Bank to obtain a decree charging its payment on the fund in the latter bank. The Circuit Court dismissed the bill, in an opinion by Judge (now Justice Blatchford), holding that the check did not operate to assign any part of the funds in the drawee's hands, or to give any lien on or right thereto, but that on the contrary the funds passed to the assignee of the drawer bank.

The case in 8th Federal Reporter, 540, decided by Justice Miller, holds the other way to some extent, although on page 543, of his opinion the following occurs: "I am not "sure, however, that the Metropolitan National Bank (the "drawee bank) could have been held liable, because I be- "lieve on reflection they *had notice of the drafts*, and it is "notice to the holder of the fund which fixes the liability "of the holder, and in that perhaps I was in error. I be- "lieve Mr. Coates notified them by telegraph of the assign- "ment of the bank to him before the drafts were pro- "tested. *That being the case the Metropolitan Bank was* "*not liable.*"

In this case the bank was notified of the assignment before the check in question was presented, but the decree makes the bank liable contrary to the very authority relied on in the court below, and the bank is charged interest on it as of an obligation maturing on the presentment of the check. It does not appear that the court's attention was called to the strong language of this court in Bank *v.* Millard, or Christmas *v.* Russell, and the silence of the opinion rather indicates that they were not brought to the attention of the court. The learned judge in that opinion holding that the check operated as an equit-

able assignment, says: "The very words equitable assign-
"ment are used because the assignment is only recognized
"in a court of equity, and not in a court of law. If it were
"recognized in a court of law, it would be enforced there,
"and we would never have heard of any such words as an
"equitable assignment. Therefore, it is an assignment of
"that much of the debt which a court of equity will recog-
"nize and a court of law will not." This is not, we think, a full statement of the origin of equitable assignments. Courts of equity, no more than courts of law, ever declared that to be an assignment in which there was no intention to assign or to part with the possession and control of the thing assigned, or no fit language employed to signify such purpose. The doctrine of equitable assignments sprang from the refusal of courts of law to recognize the transfer of possibilities, debts or other choses in action; but courts of equity gave effect to assignments of trusts and possibilities of trusts, contingent interests, expectancies, as well as assignments of choses in action.

Story's Equity Jurisprudence, 2nd vol., sec. 1039.

But there must always have been an assignment. If it was an assignment which the law would not recognize or protect, a court of equity would. The error is in calling a mere common check on a bank an assignment in equity. It has none of the elements of an assignment, as nothing is transferred or set over until it is accepted by the bank, and until such acceptance it was nothing more than a revocable direction.

Reference is made by the lower court in its opinion (Record, p. 34) to the application of the rule of tracing a fund, and while the court says there is not the fullest room for its application, still the court leans on it a little. We claim there is no room for it. The Laclede Bank had no no notice whatever of the source of the remittances it received on the 21st of October. It received them and

placed to the credit of the C. W. Israel & Co. account as directed, and as to such remittances it was the debtor of C. W. Israel & Co. as it was as to other items of the account. Again, the remittances themselves were not trust moneys. The Fort Worth bank paid the Sugg check by placing to the credit of C. W. Israel & Co a sum equal to the check; it had no notice of anything. It was simply a debtor to C. W. Israel & Co. for that amount and when it remitted to the amount of $7,000 to the Laclede Bank and $5,000 to the Exchange Bank of Wichita Falls, it was simply paying a part of its debt as directed. The check in question received by Shuler was not drawn on any specified fund, and therefore no fund can be traced with it. It was a mere ordinary check given by a bank. A check should either be held to be an assignment *pro tanto*, as it is in some States, and enforcible against the bank, or else as we claim, and as this court has held, a mere revocable direction.

II.

By the authorities cited it is put beyond question and will not be disputed, that a check may be revoked at any time before presentation, and that after such revocation a payment of it would be wholly unauthorized, and the drawee bank could not get credit for it on the deposit account. The telegram of October 24th from C. W. Israel & Co. to the Laclede Bank was (as before quoted) as follows: —

HENRIETTA, Texas, 24th.

Laclede Bank, St. Louis:

We assigned this day in favor of S. Davidson. *Hold funds subject to his order.*

C. W. ISRAEL & Co.

This telegram was received by the bank on the same day, but some two hours before the check was presented. (Record, 29.)

It is perfectly clear that the bank could not have obeyed the direction of the telegram to hold funds subject to the order of the assignee, and at the same time have obeyed the direction of the check and paid the funds out to Shuler. The two directions were inconsistent, therefore the bank acted properly in obeying the direction last given as a countermanding of the check.

In this respect this case is stronger against the checkholder than the Mastin Bank cases, because there was simply in those cases notice given of the assignment, no attempt being made to revoke or control the payment out of money on checks theretofore made.

III.

The bank was further justified in refusing to pay the check, because when presented there was not to the credit of the account of C. W. Israel & Co. sufficient money to pay the check, and a bank is not authorized to pay less than the whole amount of the check. See cases cited, *supra*, under head of points and authorities.

IV.

But if this case was in a court where a checkholder could recover either at law or equity, or both, of the bank, then the complainant Shuler would be posponed to the two unmatured discounted notes, set up in the bank's answer, of C. W. Israel & Co. one dated September 9th, 1885, for $8,000 maturing December 11th, 1885, and the other dated August 24th, 1885, for $2,500, falling due November 25th, 1885, which would consume the balance to the credit of the C. W. Israel & Co. account. No mention is made of this point in the opinion of the lower court, although directly raised by the answer and argued at the final hearing.

1st. From Section 13 of Statutes of Texas on voluntary assignments, it appears that all claims that are not due at date of assignment, may be allowed against the estate in hands of the assignee by discounting them at the rate of interest mentioned in the contract, if any, otherwise at the legal rates, etc.

Section 7 (copied in answer, record 15, and in this brief statement) provides that a creditor making proof of claim must allow all just credits and offsets, and is only allowed for the balance, if any.

Under such a law it is manifest that a balance is to be struck, as of October 24, 1885, between the assigned estate of J. N. Israel and the bank. The two unmatured notes held by the bank before referred to, amounting to $10,500, being in the name of C. W. Israel & Co., would be charged up against the balance to the credit of C. W. Israel & Co.'s account of $5,912.41, the notes being executed in the name of C. Worwel & Co., which being done would consume that balance and leave still due on the notes about $4,687.59 (less rebate of interest) to be charged up against the other two accounts of Israel, the balance coming from those two accounts after so doing would be the amount coming to the assignee from the bank. The collateral held by the bank as security for the two notes would be returned to the assignee, although averred in the answer and admitted to be of no value.

There is abundant precedent for this construction of the Texas assignment law. The bankrupt act of the United States of 1867, sec. 5073, provided as follows: "That in all "cases of mutual debts or mutual credits between the par- "ties the account between them shall be stated, as one debt "set off against the other, and the balance only shall be "allowed or paid," etc.

Sec. 5067 of same act provides: "All debts due and pay- "able from the bankrupt at the time of the commence- "ment of the proceedings in bankruptcy, *and all debts* "*then existing*, but not payable until a future day, a re-

"bate of interest being made when no interest is payable "by the terms of the contract may be proved against the "estate," etc.

The laws of the State of Massachusetts (Sec. 26, p. 883, Pub. Stat. Mass. 1882) provide: "Debts due and payable "from the debtor at the time of the first publication of "the notice of the issuing of the warrant, may be proved "and allowed against his estate at any meeting; and all "debts at that time absolutely due, although *not payable*, "may be proved and allowed as if payable with a discount "or rebate of interest, when no interest is payable by the "contract," etc., etc.

Sec. 27 (Mass.) provides: "If it appear that there has "been mutual credits given by the debtor and any other "person, or mutual debts between them, the account be- "tween them shall be stated, and one debt set off against "the other, and the balance shall be allowed or paid on "either side."

It is very clear that the spirit (and even the letter) of the Texas law, the Massachusetts law and the bankrupt law are the same. Indeed, the Texas law, in another important respect, more resembles the general features of the bankrupt law than any other State assignment or insolvent law. Sec. 9, page 6, Appendix Revised Statutes of Texas, provides that "all property conveyed or transferred by the "assignor previous to and in contemplation of the assign- "ment, with the intent or design to defeat, delay or defraud "creditors, or to give preference to one creditor over an- "other, shall pass to the assignee by the assignment, not- "withstanding such transfer," etc., etc.

The Federal courts, under the bankrupt law cited, and the Massachusetts courts under the Massachusetts law cited, have uniformly held that the account between the bankrupt and his creditor or debtor should be as to dealings between them made up as we claim, notes or other obligations not yet payable being charged or credited as required, as

though both due and payable at commencement of bankruptcy or insolvency proceeding.

In 16 National Bankruptcy Register, p. 420, ex parte Howard National Bank in re North & Co., the question arose before Judge Lowell, in a case similar to the one now being considered, and that learned and careful judge laid down the principle, that upon the bankruptcy of a depositor his deposit became a surety for the payment of his indebtedness to the bank. Such deposit should be set off against the aggregate debt of the bank, and in case of a claim for unliquidated damages, the bank may retain the deposit until the amount of its probable debt can be ascertained. Judge Lowell says: "In bankruptcy all debts are "to be liquidated as of one and the same day. * * * "The money (in the bank) or credit belongs to the as- "signee for the use of the general credits, but the law says "he shall not recover it in full and turn the particular cred- "itor over to a dividend."

And so in 14 National Bankruptcy Register, p. 148, in re Farnaworth, Brown & Co., Judge Blodgett held that if a bank after the commencement of bankrupt proceedings collects money upon drafts deposited with it by the bankrupt before that time, it may apply the money so collected towards the payment of a note of the bankrupt held by it, for two reasons, says Judge Blodgett: 1st. Because the law gives a banker a lien on any funds coming into his hands belonging to a debtor. 2nd. Because the transaction showed mutual debits and credits between the parties on which the balance is to be struck.

In Tucker *v.* Oxley, 5 Cranch, p. 182, it was held that the word "debt" as used in the bankrupt act of 1841, meant any debt provable in bankruptcy under the bankrupt act. *Ergo*, when the Texas law requires the creditor in making up proof of debt to allow in making his claim all credits and offsets that should be allowed against the claim, it means that all claims, credits and offsets held by the creditor must be taken from the creditor's claims, and,

then, an allowance is made only for the balance. So, if the Laclede Bank had undertaken to make proof on the two notes of $8,000 and $2,500 it would have been required of it to state the amount held by it as credits of J. N. Israel, which would have exceeded the notes and turned the bank into a debtor of the estate instead of a creditor, a balance being struck between them.

And so in England, under the English bankrupt law, the question whether a debt payable *in futuro* could be set off against a debt payable *in præsenti*, was one of the earliest which arose under the English bankrupt law. It was decided that such a set off was allowable on the ground that, while two such debts were not *mutually payable*, they were mutual credits and came within the equity of the statute.

Ex parte Prescott, 1 Atk., p. 230;
5 T. R. 130; Dobson *v.* Carne;
13 Ves. 65, Ex parte Wagstaff;
9 T. & R., p. 378, Atkinson *v.* Elliot.

And it has been placed on the same ground in this country.

1 Wash. C. C., p. 178;
3 National Bankruptcy Register, p. 134, Catlin *v.* Foster.

And so the courts of Massachusetts construing the statute of the State hold the same way.

A negotiable promissory note not payable until a future day may be set off against a claim against a holder by the assignee of the insolvent matter.

Aldrick *v.* Campbell 4th Gray, p. 284.

The Court in that case says: "This case is not to be

" determined merely upon the technical rules of set-off, but " upon the principles regulating settlement of insolvent es- " tates, *living or dead*. In the settlement of such estates " all mutual demands are to be balanced, claims not liqui- " dated and debts absolutely due *though payable in the fu- " ture* are to be concluded. The balance found upon such " adjudication is the only debt remaining."

And in Denman *v.* Bank, 5th Cush., p. 194, the Court says: " It is no answer (to the claim of set-off of a note " due) that the debt due from the defendant was a deposit " to be drawn from the depositors from day to day, and " that the note was not discounted on the credit of that " balance. This was no doubt true when the note was " made and discounted, and until insolvency of the deposi- " tor, but by that (insolvency) the rights of the parties " were changed, and an account is to be taken and the mu- " tual debts set off."

2d. It is also held in cases of general assignments for the benefit of creditors that the same doctrine applies.

Where a party has funds with a banker who holds the promissory note of the depositor, not yet due, the depositor may insist (and if the depositor so may the bank) that his note shall be satisfied out of the deposit, although the banker before the note becomes due had made an assignment for the benefit of his creditors.

McClagg *v.* Woodman, 28 Illinois, p. 84.

The court in this case says: "An assignee is not a pur- " chaser upon a consideration. The trustee takes the " property and choses in action subject to all defects aris- " ing from the state of affairs existing at the time the as " signment was made. Had the depositor and maker of " the note previous to the assignment applied to a court of " equity to restrain the bank from selling the note, and had " shown that the bank was insolvent, and that loss and in-

"justice would ensue by the transfer, the relief certainly "would have been given. A court of equity would not tol- "erate such injustice and wrong."

And so in Knecht *v.* U. S. Savings Institution, 2 Mo. App., p. 563, it was held that where a bank held a note not yet matured against a deceased person, and also was indebted to the deceased on general deposit account, the bank might present its claim to the Probate Court and have a balance struck between the two demands.

3d. And in equity, irrespective of any statutory provisions, the same doctrine is maintained that in case of insolvency the note or debt not payable may be used to extinguish either in whole or in part a mutual debt or credit held by tho other party.

In the case of Ford, administrator, *v.* Thornton, 3 Leigh, p. 695, the court declares that in such a case equity regards the bank as debtor to the depositor only for the excess of his money on deposit above the contents of his note. The court calls it a right of stoppage in equity on the ground of insolvency, and declares that it could have been done as well in the lifetime of the deceased for the same reason.

To the same effect is Stephens Ex parte, 11 Vesey, p. 24 (Lord Eldon, chancellor).

Also to the same purport Green *v.* Mansfield 4 Barr, 2214-20 (Lord Mansfield): "Natural equity requires (says "the court in this case) that cross-demands should compen- "sate each other by deducting the less sum from the greater, "and that the difference only is the sum which can justly "be due."

The general doctrine as claimed is laid down in Burrill on Assignments, p. 610. Also Morse on Banking, 45-46.

4th. A bank has a general lien on all moneys and funds or property of a depositor in its pssession for the balance of the general account.

Morse on Banking, 42-43.

It is, however, held that this peculiar banker's lien does not apply if, after it has been established, the banker takes security payable at a distant day. This is upon the ground that if a bank discounts paper of the depositor *on the faith* of specific and not upon general funds it has no strict banker's lien. But in this case it is averred in the answer (Record, 14) that while collateral security was taken the notes in question were discounted on the faith of the credit given to C. W. Israel & Company on the large balances generally kept with the bank and the fact that they had always paid their notes, the bank having no knowledge and making no inquiry as to the value of such collateral.

We respectfully submit that the decree of the Circuit should be reversed.

J. E. McKeighan.

Solicitor for the Laclede Bank, and J. T. Craig, Appellants.

Harrison B. Shuler,
Appellant,
v.
Laclede Bank and J. T. Craig,
Appellees.
No. 1017.

We have not seen the assignment of error of appellant Shuler, but apprehend from what occurred at the trial that they will be as follows: —

1st. That the lower court erred in allowing as a debit against the C. W. Israel & Co. account the $6,500 note dated July 25th, 1885, and which was charged up on the 24th of October, against the account, although not falling due until the 26th of October.

2nd. That the lower court erred in not entering judgment

against the bank for the whole amount of the check, or to the extent of all the residue of amounts due J. N. Israel on the other two accounts of Exchange Bank of Wichita Falls and Exchange Bank of Harold.

Neither of these points are good.

At the hearing counsel commented on the irregularity of the bank charging up the July 25th note on the 24th of October when it did not fall due until the 26th. The answer (Record, 8 & 7 and 28, 29 & 30) fully discloses how that happened. The bank and C. W. Israel & Co. had an arrangement by which the note of July 25th was to have been renewed. On the morning of the 24th of October the bank received the renewal note, which was dated the 24th of October instead of the 26th. The bank's officers therefore directed on the 24th the old note to be charged up intending at that time to discount the new note and credit the proceeds to the account of C. W. Israel & Co., but before this was done the rumor came to the bank that Israel was embarrassed; action was therefore withheld until the rumor should be verified or denied. Then came the telegram announcing the assignment.

We do not think, however, that charging the old note up on the 24th changes in any aspect the condition of the C. W. Israel & Co. account. If it had not been done on the 24th, it might regularly have been done on the 26th before the presentation of the Shuler check at 10:15 of that day. Even if Israel had not failed the bank would have been justified in holding enough money in its hands to the credit of the C. W. Israel & Co. account to have paid that note although Israel would have until the close of the 26th to have paid it. Where a depositor has a note falling due in bank and also money to his credit, more than enough to pay it, it does not require a formal check to authorize the payment of the note by charging it up against the account. An authority is presumed on the part of the bank

to pay the note by charging it up to the depositor's account.

We go further and claim that if no rumor of Israel's assignment had come to the bank on the 24th and it had discounted the new note and given credit to the C. W. Israel & Co. account, still on receiving the telegram on the 26th of the Israel assignment, it might have rescinded its discount and charged the note back. Such a discount would have of course been made on the faith of Israel's continued solvency and the bank could not have been held to such a renewal when without its knowledge the maker of the note at the very time of renewal was making an assignment. Some reference was made in the lower court of the bank still being in possession of the collateral described in the renewal note. The reason of this is because of attachments and garnishments against the bank which prevented it from returning the collaterals (Record, 11), although aside from this reason there is no force in this criticism of the action of the bank.

Neither on any theory is there any force in Shuler's contention that he should not only have paid on his check the balance to the nominal credit of the C. W. Israel & Co. account against which the check was drawn, but also that there should be paid to him enough money to pay the remainder of his check out of one or the other, or both of the other two Israel & Co. accounts. This could not be done even in those States like Iowa and Illinois, where checks are recognized as assignments and enforcible against the bank without acceptance. The doctrine in those States is put on the ground of presumed intention to assign *pro tanto* the fund or debt drawn against. Certainly from a check drawn in the name of C. W. Israel & Co., and which if it had been paid would have been charged against that account alone, no intention can be gathered of a purpose to assign the other two Israel accounts.

We therefore submit that if a check is, contrary to the

former decisions of this court, to be treated as an assignment, or as creating a lien on the debt or fund drawn against, there is no error in the lower court's decree in either of the respects referred to.

Respectfully submitted,

J. E. McKEIGHAN,
Solicitor for Laclede Bank and J. T. Craig.